Case Number:	Civil Application E121 & E120 of 2021 (Consolidated)
Date Delivered:	27 Apr 2021
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	Roselyn Naliaka Nambuye, Sankale ole Kantai, Patrick Omwenga Kiage
Citation:	Attorney General & another v Tolphin Nafula & 5 others; Attorney General (Interested Party) [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	onstitutional Petition E112,E114 & E134 of 2021 (Consolidated)
Case Outcome:	Application allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & KANTAI, JJ.A)

CIVIL APPLICATION NO. E121 OF 2021

BETWEEN

THE HON. ATTORNEY GENERAL.....APPLICANT

AND

TOLPHIN NAFULA.....1ST RESPONDENT

PHILLIP THUITA.....2ND RESPONDENT

DAMARIS WAKIURU NDIRANGU.....3RD RESPONDENT

MEMBA OCHARO.....4TH RESPONDENT

JUDICIAL SERVICE COMMISSION..... 5TH RESPONDENT

PROF OLIVE MUGENDA ..... 6TH RESPONDENT

CONSOLIDATED WITH

CIVIL APPLICATION NO. E120 OF 2021

BETWEEN

JUDICIAL SERVICE COMMISSION.....APPLICANT

AND

TOLPHIN NAFULA .....1ST RESPONDENT

PHILLIP THUITA .....2ND RESPONDENT

DAMARIS WAKIURU NDIRANGU.....3RD RESPONDENT

MEMBA OCHARO.....4TH RESPONDENT

PROF OLIVE MUGENDA.....5TH RESPONDENT

AND

THE HON. ATTORNEY GENERAL..... INTERESTED PARTY

(An application for stay of execution pending the lodging, hearing and determination of the intended appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (Mrima, Okwany & Nyakundi, JJ) dated 21st *April, 2021* ***in*** **Constitutional Petition No. E112 of 2021 (Consolidated with Petition Nos. E114 & E134 of 2021)**

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RULING OF THE COURT

By a ruling delivered on 21st April 2021, a 3-Judge bench of the High Court at Milimani (Mrima, Okwany & Nyakundi, JJ) issued orders that barred the Judicial Service Commission (JSC) from completing the exercise of recruitment of a new Chief Justice.

The orders, issued as conservatory orders, were to the effect that JSC was not to engage in post-interview deliberations that would culminate in the selection and nomination of the successful candidate for that position. They also restrained JSC from interviewing candidates for the position of Judge of the Supreme Court pending the hearing and determination of the same 3 consolidated petitions on which were anchored the applications for conservatory orders.

Aggrieved by those orders, JSC and the Hon. Attorney General filed notices of appeal followed by motions on notice in this Court, seeking orders of stay of implementation of the orders of the court below pending the hearing and determination of the intended appeals. The two applications under **Rule 5(2)(b)** of the **Rules of the Court** were ordered consolidated and we shall, for convenience, refer to them together or interchangeably, where the context permits.

In the grounds appearing on the face of the motions, the applicants contend that; the impugned orders have the effect of throwing the recruitment process for Chief Justice and Judge of the Supreme Court into limbo, putting the country at peril of an impending constitutional crisis of unprecedented proportions; they have arguable appeals which they apprehend will be rendered nugatory unless appropriate stay orders are granted; it is in the public interest that the said orders be stayed the High Court, upon being moved, declined to stay its orders on the basis that the applicants had at least two days within which they could move this Court for apposite orders, as they have in fact done; there is a risk of miscarriage of justice and an egregious violation of mandatory constitutional and statutory provisions that would render the proceedings at the High Court a nullity; there is imminent danger of a miscarriage of justice resulting in substantial loss to the public interest; and, the respondents who were the petitioners in the court below will suffer no prejudice if the orders sought are granted.

The applications are supported by the respective affidavits of **Anne Amadi,** the Chief Registrar of the Judiciary and Secretary to JSC, and **Kennedy Ogeto,** the Solicitor General. The affidavits give the background, context and procedural history of the petitions before the High Court and proceed to provide the evidentiary support to the grounds we have adverted to. They swore that JSC and **Prof. Olive Mugenda** did file notices of preliminary objection in opposition to the petitions at the High Court, which challenged the jurisdiction of that court to entertain the petition but that, contrary to their legitimate expectations, the same had not been, and were

not addressed, as at the time the impugned orders were made.

They aver, further, that the impugned orders have the effect of throwing the entire process of selection and nomination of the Chief Justice into a legal quandary in so far as they would lead to an outrunning of the strict timelines imposed by statute. This is compounded by the fact that the Acting Chief Justice now heading the Judiciary can only do so for a period not exceeding six months pending the appointment of the Chief Justice, which time is fast running out, thus presenting the possibility of a void in the leadership of the Judiciary. They reiterate that the intended appeals are arguable; they would be rendered nugatory, absent stay; and that there is immense public interest that the same be stayed so as to preserve the subject matter of the intended appeals, which they identify as the completion of the interview process per the allocated timelines.

When served, the 1st respondent **Tolphin Nafula** filed a replying affidavit sworn on 26th April 2021, asserting that the interview for the position of Chief Justice is one of the most fundamental duties undertaken by JSC. She swore that she perused the JSC website and learnt that **Prof. Mugenda** had been elected interim Vice-Chair of JSC, and that she would be overseeing the interviews that were to commence on 12th April 2021. To her, Prof. Mugenda could not legitimately chair the interviews since, by virtue of being the Acting Chief Justice, **the Hon. Lady Justice Philomena Mwilu, DCJ** would automatically perform that function. Believing that Prof. Mugenda had been *„imposed"* as JSC Chair *"for political posturing setting the stage for rigging in a candidature that is favourable to the powers that be",* she moved the High Court seeking declarations that; the DCJ/Ag CJ, shall be the chairperson of JSC during the interviews; JSC is obligated to publish the transcripts of the candidates' interviews and the grades scored by each candidate as made by each Commissioner; and the reasons for marking a recommendation for appointment of the best ranked candidate for Chief Justice and Judge of the Supreme Court. She also sought interim reliefs through an application for conservatory orders against the interview process, to obviate imminent danger of continued violation of the Constitution.

Miss. Nafula denied being served with a notice of preliminary objection to her particular petition and swore that the matters she raised before the High Court are within its jurisdictional remit. She defended the High Court's issuance of interim conservatory orders as the petitions raised serious and weighty cross-cutting constitutional issues which were *"novel in nature and requiring serious consideration."* She thus swore that this is not a proper case for us to grant stay of execution pending appeal as we should not interfere with the High Court's exercise of discretion; it is impossible for this Court to determine if there is an arguable appeal as the High Court reserved reasons for grant of the conservatory orders to be given with its judgment; the High Court is cognizant of the statutory timelines and will move with speed so that the fear of a constitutional crisis does not hold; should this Court stay the conservatory orders the petition at the High Court will be rendered academic; and it would be unfair for the impugned process to proceed in blatant violation of the Constitution.

The 4th respondent JSC's motion, **Memba Ocharo,** also swore a replying affidavit in opposition thereto on 24th April 2021. He expressed himself as vehemently opposed to the grant of stay orders herein, as the conservatory orders obtained averted further constitutional violations and wastage of public funds by JSC in a recruitment *process "marred with (sic) illegalities and characterized with (sic) brazen constitutional infringements."* He swore that it was strange, disconcerting and constitutionally untenable that **Prof. Mugenda** was chairing the sessions which he perceived as *"open defiance and insubordination of constitutional and statutory dictates"* that the chair be the Ag. Chief Justice. He blamed JSC for interviewing candidates who had not availed theirs, and their spouses', wealth declarations. He swore that Commissioner **Patrick Gichohi** was a stranger to the Commission purporting to represent the Public Service Commission yet he had retired; and that there was need for the next Chief Justice to be lawful, constitutional and acceptable to the people to be legitimate, and thereby avert rejection of the Supreme Court by the people.

Lauding the ruling of the High Court as well-reasoned and balanced upon persuasion by the *"erudite submissions"* of his *"able advocate Mr. Danstan Omari,"* he swore that this Court should not interfere with the High Court's exercise of discretion at the instance of an application he termed *"alarmist, misconceived, misguided and certainly premature."*To him, should JSC recommend persons for appointment as Chief Justice and Judge of the Supreme Court, the substratum of the petitions at the High Court will be defeated, and the two persons will be insulated from removal, notwithstanding glaring constitutional violations that will have been established.

He denied that the applicants' appeals will be rendered nugatory if stay orders are not granted, and implored the Court not to issue orders that might prejudice the hearing and determination of the petitions now pending at the High Court and, instead, await a merit determination therein when ripe and crystallized. To him, public interest favours our non-interference with the conservatory orders. He urged us to dismiss the applications, which he termed "*hopeless, premature, illogical and obviously without merit."*

Prof. Mugenda swore an affidavit on 22nd April 2021, in which she supported the applications. She fully associated herself with the supporting affidavit of **Ms. Amadi**. She swore that in early April 2021 she was elected pursuant to **section 30(4)** of the **Judicial Service Act** as interim Chairperson of the selection panel of JSC to conduct interviews for the position of Chief Justice and Judge of the Supreme Court. She swore that **Petition NO. E114,** which sought a declaration that she is liable for removal as a JSC Commissioner on various grounds, a notice of preliminary objection was filed, challenging the High Court's jurisdiction. The preliminary objection was premised on the ground that **Article 251(2)**of the Constitution decrees that a member of a commission or a holder of an independent office can only be removed by petition to the National Assembly, and the High Court should first have determined its jurisdiction. She further swore that the conservatory orders were made without jurisdiction and are therefore null and void *ab initio*, compounded by the fact that the learned Judges did not give reasons for such drastic orders hamstringing JSC's constitutional functions made in violation of the principles of separation of powers. She repeated the spectre of constitutional crisis deposed to by **Ms. Amadi**, and reiterated that the recruitment process had already utilized a lot of human and financial resources and its stoppage at the eleventh hour was unjustifiable.

The public interest should not have been subordinated to the petitioners' unmerited and unsubstantiated interest, and the grant of the conservatory orders amounted to a usurpation of JSC's functional independence. It was thus in the interest of justice, and the greater public of the Republic, that the application be granted.

When the applications proceeded to hearing before us virtually owing to the prevailing Covid-19 global pandemic, on the Court's GoToMeeting platform, a battery of learned and able counsel appeared. For convenience, we shall refer to them in relation to their respective clients by name. Learned counsel **Mr. Nyamodi** appeared with **Mr. Ogosi**, for the Hon. Attorney General; **Mr. Ongoya** learned counsel for Ms. Tolphin Nafula; learned counsel **Mr. Omwanza** with **Mr. Muchiri** and **Mr.Wakiru** for respondents, Mr. Philip Thuita and Ms. Damaris Wakiuru Ndirangu; learned counsel **Mr. Gumbo** with **Mr. Kipkogei**; **Ms. Nasiloli** and **Mr. Chalo** for JSC; learned counsel **Mr. Omari** with **Mr. Wambui**, **Mr. Macharia, Ms. Masaki, Ms. Kathurima** and **Mr. Aranga** for respondent, Mr. Memba and; finally, learned senior counsel **Mr. Waweru Gatonye** with **Mr. Muchiri** and **Mr. Bett** for respondent, Prof. Mugenda.

It was agreed at the outset that the two applications be consolidated with **E121 of 2021,** in which Mr. Gatonye learned senior counsel appears, as the lead file. It was also agreed that the preliminary objection filed for respondent Mr. Ocharo objecting to the application by the Hon. Attorney General on the basis that he lacked capacity to file any appeal to this Court having been but an

interested party in the court below, be argued within the applications. We observed that the said preliminary objection did not call into question our jurisdiction. The parties had variously filed written submissions as well as digests and bundles of authorities, all electronically.

Even though these are **Rule 5(2)(b)**applications which we ordinarily dispose of, in present times, by way of written submissions without the appearance of counsel, it is undisputable that the matter at hand is weighty with a huge public interest component and touching on crucial constitutional processes. For those self-evident reasons, the matters as listed called for us to afford counsel the opportunity to address us comprehensively, which also explains this unusually long ruling.

Going first, **Mr. Gumbo** submitted that the orders of the High Court were manifestly wrong and had occasioned hardship to JSC and the nation at large. He faulted the learned Judges of the High Court for failing to grant a stay of their impugned orders and instead pointing the aggrieved parties in the direction of this Court for relief, on the basis that they still had two days to do so. Citing ***NATIONAL BANK OF KENYA vs. SAMWEL NGULU MOTONYA [2019] eKLR,*** a decision of this very bench of the Court, and ***FRANCIS WAMBUGU MUREITHI vs. OWINO PAUL ONGILI BABU & 2 OTHERS [2019]*** by the Supreme Court, counsel invited us to make an enquiry and find that the High Court improperly exercised its discretion, and so interfere therewith, because the grant of conservatory orders was plainly wrong and unreasonable.

Turning to the well-trodden path of what an applicant must show to succeed on an application for stay of execution, **Mr. Gumbo** urged that, as can be gleaned from JSC's draft memorandum of appeal setting out some seven grounds, the intended appeal was arguable. It was wrong for the High Court to issue conservatory orders purportedly because the petition raised weighty issues of law yet who should chair the JSC selection panel was a simple matter easily answerable by reference to the Judicial Service Act. It will be argued on appeal that the learned Judges ignored the relevant consideration of *prima facie case*, public interest and balance of convenience in granting the conservatory orders. Moreover, they aided petitioners who had come to court late in the day when the process was well advanced in disregard of the maxim that *equity does not aid the indolent.* The petitioners would still have had a remedy even at the conclusion of the process and, is so far as the High Court issued orders that were contrary to statute, they are amenable to setting aside on appeal and being stayed at the present moment.

Counsel further contended that on the question of materiality, the petitioners did not stand to suffer any harm, so that the learned Judges ran afoul binding precedent in the Supreme Court decision of ***GATIRAU PETER MUNYA vs. DICKSON MWENDE KITHINJI & 2 OTHERS [2014] eKLR*** which emphasized the need to first establish inherent merit of a case before issuance of a conservatory order. He criticized the learned Judges for issuance of conservatory orders before pronouncing themselves on the fundamental objection to their jurisdiction that had been raised.

On the nugatory aspect, **Mr. Gumbo** submitted that the High Court's ruling presented serious practical difficulties, as the time within which the office of Chief Justice must by law be filled is running out. As the DCJ cannot act for longer than 6 months, the possibility is real that the judicial arm of Government will be without a head. Moreover, huge financial and human capital has already been expended in the process, and for it to be so wasted in account of the High Court's orders does not accord with prudent use of public resources. He pressed that the petitioners would suffer no loss or prejudice were the process to be completed untrammeled, as each commissioner has but one vote and the chairperson is without a casting vote. To have the Ag DCJ chair the interview process, as opposed to **Prof. Mugenda,** would amount to little more than changing their sitting positions at JSC.

Counsel urged us to allow the application for stay.

Also of the same view was **Mr. Nyamodi,** who reiterated that the intended appeals are arguable. He blamed the learned Judges for failing to scrutinize the petitions for inherent merit, which they lacked as they did not disclose any constitutional controversy. Their only grouse was that the DCJ did not chair JSC yet, in counsel's view, it is clear the DCJ does not sit at the JSC on account of her office, as such, but rather as the duly elected representative of the Supreme Court Judges by dint of **Article 171(2)(b)** of the Constitution, and no additional rights accrue to the office by reason of being on JSC. In short, as the petitions lacked inherent merit, they could not support the conservatory orders given.

Senior counsel **Mr. Gatonye** also supported the applications, contending that the intended appeals were without a doubt arguable, foremost being on the High Court's failure to pronounce itself on its questioned jurisdiction as the proper method for removal of a Commissioner is set out under **Article 251(2)** of the Constitution. On the nugatory front, Mr. Gatonye reiterated the theme of constitutional crisis likely to be engendered by the conservatory orders. Adverting to the public interest, he castigated the petitioners for having moved the High Court at the tail end of the process, and posited that their interests ought not to defeat the interest of the public. To him, stay orders will be most appropriate to enable the Judiciary to properly function until the process and the whole matter is determined substantially on appeal, which will not cause the petitioners any prejudice.

Mr. Gatonye rested by citing the decision of ***KATIBA INSTITUTE vs. ATTORNEY GENERAL& 9 OTHERS*****[2020] eKLR,** in which this Court, on an application by the same petitioners, among others, had sought to prevent Prof. Mugenda from assuming office, pronounced itself first that **Article 252** provides for removal and, further, that even if a person is sworn in and takes office, the court can still invalidate his or her appointment, which he urged to guide us since an illegal decision can always be recalled and invalidated.

Leading opposition to the applications, **Mr. Ongoya** lambasted the applications for being blanket in formulation, seeking to stay even some orders beneficial to the applicants, to which they had consented. He emphasized the need for specificity and particularity of pleadings, which this Court constantly advocates. He submitted that for us to grant a stay would be to suspend the conservatory orders issued by the High Court in exercise of its discretion for which a very strong case is required but which, in his view, the applicants had not made out. He defended the learned Judges' proceeding as they did despite the jurisdictional challenge, contending that it was raised in only one of the 3 consolidated petitions. He maintained that there is an Ag Chief Justice during that period and so it is she that should chair JSC. To him, there would be greater loss of public funds and human resources were we to allow the process to proceed to conclusion yet it could well be later invalided. Moreover, no crisis will occur as the High Court is well able to dispose of the petitions in good time to allow for the other process to restart and be completed in good time. He dismissed questions of crisis as no more than *"scare mongering"* on the part of the applicants.

In answer to a question we posed to him, **Mr. Ongoya** stated that despite the unsatisfactory manner in which the applications were framed, this Court could still sever the prayers and make appropriate orders, but he qualified it by stating that it could lead to grave unintended consequences, on which he did not elaborate. He also conceded that the DCJ entered JSC as a representative of the Supreme Court judges but added that *"she became more with the retirement of the Chief Justice."*

Mr. Omwanza associated himself with those submissions. He stated that the Court has in ***DEYNES MUREITHI & 4 OTHERS vs. LAW SOCIETY OF KENYA [2016] eKLR*** and in ***TEACHERS SERVICE COMMISSION vs. KENYA NATIONAL UNION OF***

TEACHERS& 3 OTHERS[2015]eKLR held that appellate courts should not easily grant interlocutory appeals except in exceptional cases, and that no such case was shown herein. To him, it had not been demonstrated that the Judiciary was not working since, with 5 judges, the Supreme Court was quorate. There was no apocalyptic event that warrants our grant of stay.

Mr. Omwanza submitted that the doctrine of judicial restraint does not apply where a person is seeking to enforce the Constitution as were the petitioners. The High Court was, therefore, right to issue the orders it did as a proper case had been made out for the same. He recalled that issuance of conservatory orders was not unprecedented and urged that the processes leading to the appointment of Chief Justice and a Judge of the Supreme Court should not be diluted.

Also opposing was **Mr. Omari,** who warned that immediately the conservatory orders are vacated, the interviews will be completed and persons sworn into office, which will render the proceedings pending at the High Court moot. He also warned that such a scenario will lead to a diminution of confidence in the Supreme Court and the Judiciary, which might provoke a worse situation than the post-election violence of 2007-8. He suggested that we should not be overly concerned about statutory timelines as there have been instances where the courts have frozen such timelines. He denied that the applicants were guilty of indolence.

Addressing the preliminary objection before us, **Mr. Wambui** was of the view that the Attorney-General having been joined as an interested party in the High Court proceedings, he had no locus to file an appeal, as his role is limited. For this, he cited the Supreme Court's decision in ***METHODIST CHURCH IN KENYA vs.*** **MOHAMMED FUGICHA & 3 OTHERS** ***[2018] eKLR***.

Making brief reply, Mr. Gumbo stated that the petitioners and the Judges missed the essential dichotomy between the Judiciary and JSC under the Constitution. Thereunder, the Deputy Chief Justice is the substantive assistant and deputy of the Chief Justice as head of the Judiciary and Deputy President of the Supreme Court. Conversely, the Deputy Chief Justice has no role, *qua* DCJ, in JSC whose members appoint the vice chairperson. Thus, in the absence of the Chief Justice, the selection panel appoint sits chair. Counsel pointed to our recent history where there have been Deputy Chief Justices who were not members of, and had absolutely no role in JSC, to make the point.

On his part, **Mr. Nyamodi** submitted that the effect of the order consolidating the three petitions was that the jurisdictional challenge filed in the one, covered the whole. Emphasizing that the Deputy Chief Justice as such had no role in JSC, he posed the rhetorical question: *"Had the current Deputy Chief Justice not been a representative of her court there, could she go to JSC and install herself as its chair""* He was quick to concede, when we posed the question, that the Ag, Chief Justice has herself not made, or expressed any opinion on, the claims made by the petitioners.

In answer to the preliminary objection, **Mr. Ogoso** posited that the question of joinder of the Attorney-General having been settled at the High Court, he had the right to move to this Court if aggrieved. He referred to ***CREW vs. JOHN HARUN MWAU & 6 OTHERS*** ***[2012] eKLR.*** He repeated that the preliminary objection lacked merit as an interested party in the High Court can file an appeal before us.

Finally, **Mr. Gatonye** pointed out that the petitioners who are respondents before us had not commented on the critical question raised, that the High Court acted without jurisdiction, which he asked us to view as a concession of the point on their part. He also pointed out, in opposing it, that no relevant authority had been cited in support of the contention that an interested party, such as was the Attorney-General, has no *locus* to prefer an appeal.

We have given full consideration to the applications, the rival affidavits, counsel's submissions, and the authorities cited. This, no doubt, is a matter of grave and delicate character, and we have approached it with anxious care, alive to what is at stake and the ramifications of our decision one way or the other, for deciding it we must. As Judges, we are bereft of the luxury of decisional abstention and cannot shirk the responsibility to decide, no matter the stakes.

Before we go into the merits of the applications, we shall dispose of the preliminary objection mounted by the 4th respondent **Mr. Memba Ocharo,** who makes the novel argument that as an interested party in the court below, the Attorney-General is non suited and lacks the *locus standi* to file an appeal. Were we to uphold that objection, both the Attorney-General's notice of appeal and the application before us would be rendered incompetent and stricken with fatal invalidity. With respect, however, we cannot. No authority of relevance has been placed before us to buttress such a view of the law. The **FUGICHA** case, (supra) cited in aid, provides little aid to the argument advanced. Suffice to say that a properly-joined party to the proceedings of a first instance court is not handicapped from filing an appeal if aggrieved. **Rule 75(1)** of the **Court of Appeal Rules 2010** provides that **"any person who desires to appeal to the Court shall give notice in writing**

…."We have no difficulty concluding that the Attorney General does have locus and the preliminary objection accordingly fails.

On to the substance of the applications, it has long been settled that an applicant seeking interim relief under **Rule 5(2)(b)**must establish that he has an arguable appeal. Put otherwise, he should show that he has a *bona* fide point of law or fact that calls for a response from the other side, and is worthy of consideration and decision by the Court. It should not be a frivolous or shadowy point, devoid of substance, but it need not be one that must necessarily succeed upon full hearing of the appeal. The threshold for arguability is therefore quite low. Moreover, a single arguable point suffices to satisfy the requirement.

It has been argued, as is borne out by the record, that the learned Judges of the High Court failed to address the threshold question of whether they had the requisite jurisdiction, the legal power or authority, to entertain and determine the petitions or any proceedings connected therewith. Jurisdiction had been objected to on the basis that as the removal of a member of a Constitutional Commission had been raised by the petitioners, the proper forum and procedure to address the issue was the National Assembly, by way of a petition presented thereto by dint of **Article 251** of the Constitution. That article sets out in elaborate terms the process, including presentation of a petition to, and consideration thereof by, the National Assembly, and appointment of a tribunal to investigate the matter, before recommendation to the President for removal.

It seems to us quite obvious that with such objection before it, the High Court was obligated to make a determination on it. To fail to pronounce on it and proceed to issue conservatory orders opened that Court to the perception of possible judicial overreach, a usurpation of jurisdiction to enquire into a matter reserved to a different and competent authority, contrary to the doctrine of deference. The matter is clearly one that the bench seized of the intended appeals will have to take argument on, and render a decision. It is doubtless arguable given the centrality of jurisdiction, to advance without which renders every step taken null and void. We reiterate the timeless dictum of Nyarangi JA, late of this Court, in **OWNERS OF THE MOTOR VESSEL LILLIAN *"S" vs. CALTEX OIL (KENYA) LTD [1989] eKLR***;

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a

continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

We think, respectfully, that the jurisdiction of the High Court was under serious attack and not to have addressed the issue renders the appeal eminently arguable. The first limb is established. Moreover, it appears to be a standout error that warrants our interference, albeit interlocutorily, in the manner urged. Nor can the other grounds in the memoranda of appeal, some of which we were addressed on, be dismissed as frivolous or devoid of substance.

An applicant must also show that if the stay sought is not granted, the appeal if successful, would be rendered nugatory, a quaint term for useless, trifling or of no effect. In other words, as a result of the apprehended loss of a great or irreversible kind having occurred in the intervening period, the success of the appeal turns out to be but a pyrrhic victory. This limb allows, indeed requires, the Court to intervene at its discretion to preserve the substratum or subject matter of an arguable appeal pending its determination.

A full discussion of these principles, complete within a compendium of the more noteworthy decisions on the same, is found in this Court's decision of **STANLEY KANGETHE KINYANJUI** ***vs. TONY KETTER & 5 OTHERS*** ***[2013] eKLR.***

Other than those two limbs, the Supreme Court has identified a third consideration to be borne in mind on an application for relief pending appeal, namely the public interest test in, among other cases, **GATIRAU PETER MUNYA vs. DICKSON MWENDA KITHINJI & 2 OTHERS**(supra),where the apex court addressed the said consideration to facilitate ordered functionality within public agencies, and to uphold the adjudicatory authority of the court. It indicated that conservatory orders should be granted ***"on the*** **inherent merit of the case bearing in mind the public interest, the constitutional value, and the proportionate magnitudes and priority levels attributable to the relevant cases."**

Having regard to the nugatory aspect and the public interest element, we find ourselves confronted by a not-too-neat picture of things. The High Court issued conservatory orders in the face of a strenuously argued challenge to its jurisdiction. It proceeded to grant conservatory orders of drastic dimensions, but before first disposing of the vital question of its authority.

Other than speaking to the arguability of the appeal, that mode of proceeding, facially without jurisdiction, renders the conservatory orders amenable to questions of legality and propriety. It casts doubts on the validity of the orders and hoists the prospects of invalidity on account of being null and void *ab initio.* The question then becomes whether it is in keeping with the tenets of the rule of law and respect for jurisdictional boundaries, as well as separation of powers, to let stand conservatory orders issued under such circumstances. And the answer to us seems patently in the negative.

We think, with respect, that courts should endeavor to facilitate obedience to and observance of constitutional bounds and statutory timeliness. In the case at bar, it is urged that truncating the interview and nomination process for the Chief Justice and eventual appointment will lead to an overshoot of the statutory timelines, with a real and present danger of a constitutional crisis of the character adverted to herein. We are not persuaded that we should actively aid and abet such a result.

Thus, while not at all treating as ***deminimis*** the concerns and complaints of the petitioners, and while concerned by the fear expressed, but still unproven, that the interview and recruitment process might fall capture to forces bent on manipulating the

process and bending it towards a pre-determined end, we cannot act on dark forebodings alone, less still ignore the jurisdictional bar apparent in the path of the High Court. The rule of law cannot be achieved by breach of law. We are satisfied that, all things considered, the public interest and the cause of justice will best be served by grant of the applications.

It bears repeating that JSC is a constitutional commission and each of its Commissioners bears a collective as well as a personal responsibility to act conscientiously in accordance with the dictates of the Constitution. It is also obvious that the completion of the recruitment process *per se* does not immunize, provide blanket cover or otherwise whitewash any procedural or substantive wrongs and iniquities, for the High Court may yet invalidate even a concluded appointment, if such be proved.

In the result, the dispositive orders we make are as follows;

1. The conservatory orders granted by the High Court on 21st April 2021 barring the continuation of the recruitment process for the Chief Justice and the commencement of the process of appointment of a Judge of the Supreme Court be and are hereby stayed pending the hearing and determination of the intended appeals.

2. To give further effect to this determination, an order be and is hereby issued staying any further proceedings in the consolidated petitions at the High Court pending the hearing and determination on the intended appeals.

3. In view of the urgency and public interest extant in intended appeals, the records of appeal shall be filed and served within *THIRTY (30)days* of the date hereof, failing which the stay orders shall automatically lapse.

4. Once filed the intended appeals shall be fast-tracked for hearing expeditiously on high priority.

5. Costs shall be in the intended appeals.

We are grateful to learned counsel for all parties. They exhibited a high level of professionalism and industry, made erudite and highly persuasive submissions and placed many authorities before us despite the strict and narrow timelines. We have perused and considered the said authorities and our not referring to any of them is no silent commentary on their worth.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2021.

R. N. NAMBUYE

……...

JUDGE OF APPEAL

P. O. KIAGE

……...

JUDGE OF APPEAL

S. ole KANTAI

……...

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR