



**Kalasinga & 3 others v Moi University (Civil Application
E054 of 2023) [2024] KECA 708 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KECA 708 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E054 OF 2023
F SICHALE, FA OCHIENG & WK KORIR, JJA
JUNE 21, 2024**

BETWEEN

**JOHN KALASINGA 1ST APPLICANT
J. MBAI AZIHEMBA 2ND APPLICANT
STANLEY K. KIROP 3RD APPLICANT
WILSON KIPTARBEI KEMBOI 4TH APPLICANT**

AND

MOI UNIVERSITY RESPONDENT

(Being an application for an injunction pending the Intended Appeal against the Judgment and Decree of the Employment and Labour Relations Court at Eldoret (M. Onyango, J.) delivered and dated 15th June 2023 in ELRC No. 30 of 2018 (As Consolidated with No. 56 of 2019))

RULING

1. The application before us is brought through the notice of motion dated 25th October 2023 pursuant to rule 5 of the [Court of Appeal Rules](#). The applicants seek an order restraining the respondent from enforcing the surcharge against them pursuant to its decision communicated on 8th August 2018 and 11th July 2019 pending the hearing and determination of their intended appeal. The applicants' case is that their intended appeal is arguable and may be rendered nugatory if the orders sought are not granted. The motion is supported by an affidavit sworn on the date of the application by the 1st applicant.
2. The application is opposed through the replying affidavit sworn by Petrolina Were on 14th November 2023. She avers that the applicants have not demonstrated how the intended appeal will be rendered nugatory and that the intended appeal is in any event not arguable. Further, that the intended surcharge



is within the tenets of employment law and the applicants will therefore not suffer irreparable damage if the orders sought are denied.

3. The application came up for hearing virtually on 6th December 2023. Learned counsel Mr. Mua Wambua appeared for the applicants while learned counsel Mr. Chemoiyai appeared for the respondent. Counsel had filed their written submissions and sought to rely on them but made brief oral highlights.
4. Through the submissions dated 24th November 2023, learned counsel Mr. Wambua submits that the issue of the construction of section 63(3) of the *Universities Act* and the question of discrimination are some of the grounds of appeal which deserve consideration by the Court. Arguing that the applicants have an arguable appeal, counsel cites the case of *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others* [2013] eKLR in support of the proposition that an arguable appeal is that which deserves to be argued fully before the Court and not one which must necessarily succeed. Asserting that the intended appeal is likely to be rendered nugatory if the orders sought are not granted, counsel argues that the applicants are apprehensive that the respondent will proceed with the surcharge and disciplinary action. Counsel relies on the case of *Kihagi & Another v. Jamii Bora Bank & 2 others* [2021] KECA 256 KLR to urge that where the applicants stand the risk of suffering irreversible damage then the nugatory aspect will have been proved. Counsel also points out that some of the applicants are aged and have since retired from employment. He consequently prays that the application be allowed.
5. In opposition to the application, learned counsel Mr. Chemoiyai relies on the submissions dated 23rd November 2023. He refers to the case of *Trust Bank Ltd & Another v. Investech Bank Ltd & 3 others* [2000] eKLR to identify the dual limbs for grant of stay orders. Counsel cites the case of *Julius Wahinya kang'ethe & Another v. Mubia Muchiri Ng'ang'a* [2017] eKLR in agreeing with the applicants' counsel that an arguable appeal is not one which must necessarily succeed. Further, that the Court should at this juncture not definitively render itself on the merits of the appeal. According to counsel, the applicants' intended appeal does not, however, disclose any arguable point and neither have the applicants demonstrated that the intended appeal will be rendered nugatory should the application be declined. Counsel refers to *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others* (*supra*) to elucidate what amounts to an appeal being rendered nugatory and submits that the applicants have not demonstrated that their intended appeal will be rendered nugatory if the orders sought are not granted. It is counsel's ultimate submission that the application ought to be dismissed with costs.
6. This application is brought under Rule 5(2)(b) of the *Court of Appeal Rules* and such an application can only succeed where the applicant demonstrates that there is an arguable intended appeal or appeal which is likely to be rendered nugatory should stay be declined. The cases of *Trust Bank Ltd & Another v. Investech Bank Ltd & 3 others* [2000] eKLR and *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others* (*supra*) cited by the parties herein speak extensively to the necessity to establish these twin principles before an order of stay of execution of judgment can issue.
7. Before we address the question as to whether the applicants have established the twin limbs upon which an order of stay of execution rides, we note that the judgment the applicants intend to appeal against was essentially a dismissal order. Normally, stay orders cannot issue against negative orders such as dismissal orders. However, the manner in which this application is presented convinces us that the motion is not totally in vain and unsuited for consideration in all aspects. We say so because the question of surcharge informed the initial filing of the suit that was dismissed and it is the same surcharge that the applicants seek to temporarily halt pending the hearing and determination of their intended appeal. Secondly, the application seeks an injunction. In the case of *In re Estate of Harish*



Chandra Hindocha (Deceased) [2021] eKLR, the Court faced with a situation similar to the one in which we find ourselves opined that:

“The record is explicit that the order issued on 5th May, 2020 triggering the filing of the notice of appeal on which the application under consideration is anchored was a dismissal order, which in law as borne out by the content of the principles of law highlighted above does not fall for consideration for purposes of granting orders for stay. However, in light of the application as laid, the applicant is not totally non suited on all aspects of the application under consideration. Our reasons are that, the order for reinstatement of the Judgment and decree of the High Court which triggered the filing of the application for setting aside resulting in the conditional orders would fall for consideration for granting of an order of stay of execution effective the date of restoration which brings the notice of appeal on which the application is anchored within the prerequisites in rules 75(1) & (2) and 77(1) of the Rules of this Court. Second, there is also a prayer for an injunction which is not barred by the sheer presence of a negative order.”

8. Back to the merits of the application, the first issue is whether the applicants have demonstrated that their appeal is arguable. The applicants have annexed a draft memorandum of appeal which has 11 grounds of appeal. Counsel for the applicants also submitted that the interpretation of section 63(3) of the Universities Act is a matter deserving of this Court’s determination. On our part, without delving deeply into the grounds of appeal, we find that the issues highlighted by the applicants makes the appeal arguable. As is often stated, even a single arguable point renders an appeal arguable. As such, we find that the applicants have surmounted the first hurdle.
9. The next limb is whether in the absence the orders sought, the intended appeal will be rendered nugatory. According to the applicants, some of them are of advanced age and retired and if an injunction is not granted, they will be surcharged. They argue that if the surcharge is allowed to proceed, disciplinary action might follow. According to them, such a turn of events would mean that should their appeal eventually succeed they would be forced to commence another round of litigation to undo the surcharge.
10. On what should be considered in order to determine whether an appeal is likely to be rendered nugatory, the Court in Stanley Kangebe Kinyanjui v. Tony Ketter & 5 others (*supra*) stated that:

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
11. Similarly, in Permanent Secretary Ministry of Roads & another v. Fleur Investments Limited [2014] eKLR the Court in considering what it means for an appeal to be rendered nugatory stated as follows:

“In Reliance Bank Limited v Norlake Investments Ltd [2002] 1 E.A. 227, this Court held that:

“..... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”

A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law.”



12. In this case, the applicants seek to bar the respondent from proceeding with effecting a surcharge against them for money said to have been received irregularly. During the hearing of the application, counsel for the applicants informed the Court that some of the applicants had retired from service. In our view, the key consideration is whether what is sought to be stayed cannot be reversed or assuaged by damages. In this case, the applicants seek to stay the effecting of a surcharge against them by the respondent which is a university established by statute. The surcharge is in terms of money whose amount is known. In our view, what the applicants seek to injunct can be undone should the intended appeal succeed. The surcharged amount can be refunded to the applicants and damages can also compensate any injury arising from the respondent's execution of the judgment. The fact that some of the applicants have retired from the service further dilutes the applicants' case as the allegation that disciplinary proceedings may be taken against them holds no water as they are no longer employees of the respondent. On the other hand, public funds would be better secured were the respondent to carry out the surcharge.
13. For the stated reasons, we find that the applicants have not satisfied the dual limbs for the grant of the order sought. Consequently, the notice of motion dated 25th October 2023 lacks merit and is hereby dismissed.
14. The final issue is about the costs of the application. Ordinarily, costs follow the event unless for good reason the court otherwise orders. In this case, we note that some of the applicants are employees of the respondent while some of them have retired. There is also an intended appeal. In the circumstances, we order that the costs of this application shall abide the outcome of the intended appeal.
15. It is ordered.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF JUNE, 2024

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

