



**Judicial Service Commission v Njau (Civil Appeal (Application)
E051 of 2024) [2024] KECA 859 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KECA 859 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E051 OF 2024
SG KAIRU, JW LESSIT & GWN MACHARIA, JJA
JULY 12, 2024**

BETWEEN

JUDICIAL SERVICE COMMISSION APPLICANT

AND

RUTH MUTHONI NJAU RESPONDENT

*(Being an application of stay of execution of the Decree from the Judgment
of Employment and Labour Relations Court at Nairobi (Ocharo, J.)
delivered on 20th December 2023 in ELRC Cause No. E766 of 2021)*

RULING

1. The Judicial Service Commission, the applicant herein has by an application dated 9th February 2024 brought under rules 5(2) (b), 43 and 44 (1)&(2) of the Court of Appeal Rules sought an order of stay of execution of the decree of Nairobi ELRC (Ocharo, J.) delivered on 20th December 2023 in ELRC Cause No. E766 of 2021 pending the hearing of the appeal.
2. By his judgment delivered on 20th December 2023, Ocharo, J. entered judgment in favor of Ruth Muthoni Njau, the respondent herein for wrongful termination of her employment by the applicant. She had challenged her dismissal from employment on the grounds that it was without a fair hearing and was contrary to the terms of the Employment Contract, the Commission's Policy, the Employment Act and the principles of natural justice. The learned Judge made orders, inter alia; a declaration that the summary dismissal of the respondent from employment was procedurally and substantively unfair, and issued an order directing the applicant to reinstate respondent to the position she was serving in at the time of her suspension, without loss of benefit or seniority.
3. Aggrieved, the applicant filed an appeal to this Court, to wit, Civil Appeal No. E126 of 2024, which is pending the hearing and determination before this Court and also filed the instant application for stay of execution of the ELRC judgment.



4. The application is supported by the grounds set out on the face thereof and those found in the supporting affidavit of Winfrida Mokaya, Registrar of the applicant (as she then was) sworn on 8th February 2024 and in the further affidavit of Arriella Saina, Advocate, sworn on 6th March 2024.
5. We heard this appeal on the 9th April 2024 where learned counsel Ms. Saina appeared for the applicant, whereas learned counsel Ms. Sitati was present for the respondent. Ms. Saina relied on written submissions, and further written submissions dated 9th February 2024 and 6th March 2024 respectively, which she briefly highlighted. On her part, Ms. Sitati relied on the respondent's written submissions dated 11th March 2024 which she also highlighted.
6. We have considered the application and the rival submissions of counsel to the parties. First and foremost, this Court's jurisdiction to stay the impugned judgment and decree is contingent on a notice of appeal having been filed against the said judgment pursuant to Rule 77 of the *Court of Appeal Rules*. This requirement is prescribed by Rule 5 (2) (b) of the *Rules* and was confirmed by this Court in *Halai & Another vs. Thornton & Turpin [1963] Ltd.* (1990) KLR 365. We are satisfied that the application is competent as the applicant has demonstrated that it filed a notice of appeal and has since filed Civil Appeal No. E126 of 2024.
7. What the applicant needs to demonstrate in order to obtain the orders sought is the fulfilment of the twin principles: one that the appeal is arguable and two, that it is likely to be rendered nugatory if the application is declined and the appeal were to subsequently succeed. What is arguable was explained in the case of *Somak Travels Ltd vs. Gladys Aganyo* [2016] eKLR, this Court held:

“It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this Court. While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application.”
8. On arguability of the appeal, the applicant has annexed a memorandum of appeal dated 9th February 2024 which contains four (4) grounds of appeal. We have considered that memorandum of appeal. The applicant contends that the learned judge erred in law and in fact by, *inter alia*; finding that the respondent's dismissal from employment was procedurally and substantively unfair; and by awarding the remedies of reinstatement with full benefits and pay from date of dismissal, which is contrary to precedent of similar cases. For these reasons the applicant is positive that it has an arguable appeal with overwhelming chances of success.
9. The respondent challenged the jurisdiction of this Court to entertain the instant application for reason that the notice of appeal was lodged out of time and without leave of the Court hence, null and void. The respondent even filed a notice of preliminary objection dated 24th February 2024. At the hearing, Ms. Sitati for the respondent abandoned the challenge on the competence of the application, urging that the applicant filed its notice of appeal in time but that what was in contention was its service which she argued was effected out of time hence, was not properly on record. The application before us is for stay of execution of the judgment and decree of the trial Court.
10. The respondent has not brought an application seeking to strike out the application. Besides, under rule 77 of the *Rules*, the jurisdiction of this Court to entertain the application for stay is contingent on a notice of appeal having been filed prior to bringing the application, which the applicant has met.



11. Looking at the grounds of appeal we are of the view that the issues raised by the applicant are not idle. For instance, the argument that the order for re-instatement without loss of benefits and seniority yet the respondent had not proved any exceptional circumstances as required under section 49 (4), of the *Employment Act* and further that the learned Judge did not follow precedents on reinstatements. We are cognizant of the fact that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous, but which is bona fide deserving determination. We are satisfied that the applicant has raised arguable issues which should be canvassed and determined on merit by way of an appeal.
12. In regard to the second principle of whether the appeal will be rendered nugatory if the order for stay is not granted and the appeal succeeds; we are guided by the decision in *Stanley Kangethe Kinyanjui vs. Tonny Keter & Others* [2013] eKLR where the court summarized what should guide a court as follows:
 - xii. The term ‘nugatory’ has to be given its full meaning. It does only mean worthless, futile or invalid. It also means trifling.
 - xiii. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.
 - ix. Where it is alleged by the applicant that the appeal will be rendered nugatory on account of the respondent’s impecuniosity, the onus shifts to the latter to rebut by evidence the claim.”
13. On the second limb of nugatory aspect, the applicant is apprehensive that unless this Court grants stay of execution of the impugned judgment, its appeal will be rendered nugatory since it was urged that the order for reinstatement with salary and benefits, if executed, the applicant may not be able to recover them back from the respondent, drawing our attention to the respondent’s admission in her affidavit that she is unable to meet her financial obligations.
14. Ms. Sitati urged that the appeal will not be rendered nugatory if the application is declined. It was urged that if at all the Court finds that the applicant has met the threshold for grant of orders of stay, then the Court should consider granting a conditional stay. That if reinstatement of the respondent was the problem, then the respondent should remain at home and receive half salary and/or further, that the her salary and other benefits be deposited in a joint interest earning account in the names of the advocates for the parties from the date of the judgment up to when the appeal shall be heard and determined.
15. This Court in *International Laboratory for Research on Animal Diseases vs. Kinyua* [1990] eKLR held that where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s impecuniosity, the onus shifts to the latter to rebut the allegation. The Court further held that such allegation calls for rebuttal evidence from the respondent. In this case, save for stating that poverty is not a ground for denial of her right to enjoy the fruits of her judgment, the respondent has not adduced evidence of her financial means. In the circumstances therefore, it is uncertain that the respondent will be in a position to refund salaries drawn by her when reinstated, should the intended appeal be successful.
16. The respondent was an Accounts Assistant. She was thus working in a position of trust. In that case, it is our view that if we decline stay and the respondent returns to the accounts office, were the appeal to succeed, it will create an awkward situation.



17. Taking into account all the facts and the unique circumstances of the case, we are of the view that we should strike a balance between the two parties. We are of the view that the best order to make is to stay the order of reinstatement and direct that the respondent be placed on half salary.
18. The upshot of this application is that we are satisfied that the applicant has established the twin principles as required under Rule 5 (2)(b) of this *Court Rules*. We order that:
 1. Pending the hearing and determination of the appeal, being Civil Appeal No. E126 of 2024:
 - i. An order of stay of execution of the judgment and decree of the Employment and Labour Relations Court dated 20th December 2023 do issue;
 - ii. The respondent shall, in the meantime, be on half salary;
 2. The costs of this application shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY, 2024.

S. GATEMBU KAIRU, FCI Arb.,

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

