



**Cabinet Secretary, Ministry of Defence & Chairperson Defence Council & another v Osman
(Civil Application E063 of 2025) [2025] KECA 1582 (KLR) (3 October 2025) (Ruling)**

Neutral citation: [2025] KECA 1582 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E063 OF 2025
W KARANJA, K M'INOTI & LA ACHODE, JJA
OCTOBER 3, 2025**

BETWEEN

**CABINET SECRETARY, MINISTRY OF DEFENCE & CHAIRPERSON
DEFENCE COUNCIL 1ST APPLICANT**

ATTORNEY GENERAL 2ND APPLICANT

AND

HASSAN ADEN OSMAN RESPONDENT

((Application for stay of execution pending the hearing and determination of an appeal from the judgment and decree of the Employment & Labour Relations Court at Nairobi (Rika, J.) dated 31st January 2025 in ELRCC No. 32 of 2014))

RULING

1. The Motion on Notice before the Court is taken out jointly by the applicants, the Cabinet Secretary, Ministry of Defence who is also the Chairperson of the Defence Council, and the Attorney General. The applicants seek an order of stay of execution pending appeal from the judgment and decree of the Environment & Labour Relations Court (ELRC) at Nairobi (Rika, J.) dated 31st January 2025.
2. Although the applicants filed a notice of appeal dated 3rd February 2025 against the said judgment and a draft memorandum of appeal, as expressed in the application before the Court the applicants seek the order of stay of execution of the said judgment pending the hearing and determination of Civil Application No. E393 of 2024 and Civil Appeal No. E441 of 2024 between the same parties and arising from a ruling of the ELRC dated 15th March 2024. The said application and appeal are pending for hearing before this Court.
3. The brief background to the application is as follows. The respondent, Hasan Aden Osman enlisted in the Kenya Army on 28th April 1988. He served and attained the ranks of SPR and Military Driver Class



- II. During his time in the Defence Forces, he was selected to serve in the United Nations Peacekeeping Missions in the Former Yugoslavia and Sierra Leone.
4. On 22nd March 2006, the respondent was charged before his Commanding Officer with the offence of conduct prejudicial to good order and service discipline contrary to section 68 of the Armed Forces Act Cap 199 Laws of Kenya (repealed). The charge was based on allegations that the respondent had stolen a bicycle belonging to a Corporal Boniface Muriithi on 15th February 2006. The respondent was convicted, sentenced to 42 days imprisonment, and dismissed from service.
 5. By a petition dated 16th January 2014 and filed in the ELRC, the respondent challenged his conviction and dismissal from the Defence Forces on various grounds, among them violation of his right to a fair hearing under section 77(2) of the former Constitution; lack of jurisdiction on the part of the Commanding Officer to try the offence with which the appellant was charged; and the purported loss of his pension without the concurrence of the Public Service Commission as required by sections 113(a) of the former Constitution.
 6. By way of relief the respondent prayed for a declaration that his conviction, imprisonment and dismissal from service was unlawful, null and void; restatement and or award of his pension and gratuity; payment of salary arrears with effect from the date of dismissal; damages for unlawful imprisonment, unlawful dismissal, loss of promotion, lost earnings and injured reputation; and costs.
 7. On 11th October 2023, the applicants applied to the ELRC to expunge from the record two bundles of documents forming part of the respondent's claim on the ground that they offended sections 68(2) (c), 80 (1) and 81 of the *Evidence Act*. They contended that one of the bundle of documents comprised uncertified photocopies whilst the other was a copy of restricted documents which the respondent was not authorised to possess. As a matter of fact, the ELRC found that the first bundle contained the respondent's certificate of service and certificate of discharge, together with his service testimonials showing the military courses he had undertaken, whilst the second bundle contained summary of the charges against the respondent and the claim that led to the termination of his service.
 8. The applicants' application was heard by Rika, J., who by a ruling dated 15th March 2024 dismissed the same after finding that the documents in question were merely part of the respondent's service records and that the originals of those documents were in the possession and custody of the 1st respondent who had not denied their authenticity or offered to produce the originals.
 9. The applicants were aggrieved and lodged Civil Appeal No.E441 of 2024 and Civil Application No. E393 of 2024 seeking stay of further proceedings before the ELRC. The applicants appear to have gone to slumber for neither the application nor the appeal has been heard and determined to date.
 10. In the meantime, and in the absence of an order of stay of proceedings from this Court, the hearing of the respondent's claim proceeded in the ELRC and by the judgment dated 31st January 2025, the ELRC found that the respondent's conviction, imprisonment and dismissal from service was unlawful; that restatement was not available in the circumstances; and that the respondent was entitled to his pension. The ELRC awarded him Kshs 1,000,000.00 as general damages for the unlawful conviction, imprisonment and dismissal from service with interest at court rates. The court dismissed his other claims. Each party was directed to bear their own costs.
 11. After lodging a notice of appeal, the applicants filed the application now before us. In support of the application, the applicants relied on the supporting affidavit sworn on 7th February 2025 by R. A. Nyonje and written submissions dated 19th February 2025.



12. The applicants submit that the pending appeal is arguable because the ELRC allowed illegally obtained evidence and denied the applicants the right to a fair hearing contrary to Article 50 of *the Constitution*. They also argue that the appeal is arguable because the ELRC entertained a claim which was time-barred under the section 3 of the *Public Authorities Limitation Act*, Cap 39, Laws of Kenya. Relying on the decision of this Court in *Wellington Nzioka v. Attorney General* [2016] eKLR, the applicants contend further that the ELRC erred by entertaining the respondent's claim which was brought after inordinate delay and without any explanation for the delay.
13. It is the applicants' further submission that the pending appeal will be rendered nugatory if the Court does not stay execution of the judgment of the ELRC because they will suffer injustice, irreparable loss and damage on account of violation of their constitutional right to a fair hearing. They relied on the decision of this Court in *Center Star Ltd & another v Halima Mahmood Ali & 2 Others* [2018] KECA 433 (KLR) on the principles that guide the Court in an application for stay of execution.
14. Although duly served with the application and the hearing notice, the respondent neither filed submissions nor appeared for the hearing of the application.
15. We have duly considered this application. In an application for stay of execution like the one before us, the applicant must satisfy the court that the appeal or intended appeal is arguable and that unless the relief sought is granted, the appeal will be rendered nugatory if it succeeds. The application must establish those two considerations and it is not enough to satisfy only one. (See *Stanley Kang'ethe Kinyanjui v. Tony Ketter & 5 Others* [2013] KECA 378 (KLR)).
16. There are peculiar circumstances which we must highlight in this application. The pending appeal challenges the decision of the ELRC to admit documents that the applicants claimed were illegally obtained. The pending application sought an order of stay of proceedings pending the hearing and determination of that appeal. The applicant did not prosecute either the appeal or the application and as a result, the ELRC proceeded and heard and determined the respondent's substantive claim. The appeal that the applicant claims will be rendered nugatory is not the appeal arising from the judgment of the ELRC dated 31st January 2025 to which the motion before us relates, but the appeal against the ruling dated 15th March 2024. Once the ELRC heard and determined the respondent's claim, we do not perceive the purpose that the applicants hope to achieve by concentrating on the ruling of 15th March 2024 rather than the judgment of 31st January 2025. The application for stay of proceedings which the applicant lays emphasis upon became moot the moment the ELRC concluded the proceedings and rendered its judgment.
17. Some of the applicants' arguments to the effect that the pending appeal is arguable because the ELRC entertained a time-barred or inordinately delayed claim are a pure red herring. The pending appeal is against the ruling of the ELRC relating to admissibility of evidence. The issue of whether the claim was time-barred was the subject of an earlier ruling by Wasilwa J., dated 19th January 2016, which is not the subject of the pending appeal. We cannot fathom how the applicant can, even surreptitiously, introduce those issues in the pending appeal.
18. The real hurdle in the applicants' path, as far as this application is concerned, is that the applicants have not suggested, even remotely, that the respondent is unable to refund the sums that he was awarded by the ELRC. Without such assertion and an opportunity for the respondent to respond, the Court cannot assume that the respondent is incapable of refunding the money in question. That simply means that the applicants have not satisfied the Court that the pending appeal will be rendered nugatory.



19. Having failed to satisfy both considerations under rule 5(2) (b) of the Court of Appeal Rules, this application has no merit and is hereby dismissed. We make no orders on costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2025.

W. KARANJA

JUDGE OF APPEAL

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K. M'INOTI

JUDGE OF APPEAL

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K. A. ACHODE

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

