Attorney General & 3 others v Maingi & another (Civil Application E252 of 2024) [2025] KECA 281 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KECA 281 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E252 OF 2024

DK MUSINGA, MSA MAKHANDIA & JM MATIVO, JJA

FEBRUARY 21, 2025

BETWEEN

ATTORNEY GENERAL ..... 1ST APPLICANT

INSPECTOR GENERAL OF POLICE ..... 2ND APPLICANT

COMMISSIONER OF POLICE ..... 3RD APPLICANT

PUBLIC SERVICE COMMISSION ..... 4TH APPLICANT

AND

PATRICK MUNYAO MAINGI ..... 1ST RESPONDENT

NATIONAL POLICE SERVICE COMMISSION ..... 2ND RESPONDENT

(Being an application for stay of execution of the judgment and orders of the Employment and Labour Relations Court of Kenya at Nairobi (A. N. Mwaure, J.) dated 5th April 2024 in ELRC Petition No. 108 of 2017)

RULING

1. This ruling determines the applicants' application dated 20th May 2024 seeking stay of execution of the judgment and decree issued on 5th April 2024 (Mwaure, J.) in Nairobi Employment and Labour Relations Court (ELRC) Petition No. 108 of 2017 pending hearing and determination of their intended appeal to this Court from the said decision. Alternatively, the applicants pray for stay of further proceedings in the said case pending hearing and determination of their intended appeal. The application is brought under Sections 3, 3A and 3B of the *Appellate Jurisdiction Act* and rule 5 (2) (b) of the *Court of Appeal Rules*, 2022.

2. The application is premised on the grounds on its face and the supporting affidavit of Elizabeth Marube, Director, Legal Affairs, Kenya Police Service sworn on 20th May 2024 together with annexures thereto.

3. A brief summary of the facts which elicited the litigation before the ELRC is necessary in order to properly contextualize the parties' diametrically opposed arguments presented to us. Luckily, this background is either common ground or uncontroverted. On 1st August 1994, the 1st respondent and an acting inspector of police, Charles Kamunya Kogo, was instructed by his section head to proceed to Nyandarua Lodge, River Road, Nairobi and arrest a Ugandan National by the name Arnold Mukiisa and hand him over to the OCS, Kileleshwa Police Station. The suspect was to be interrogated by the 1st respondent and thereafter charged with the offence of being in the country illegally, but the 1st respondent booked the suspect at Kileleshwa Police Station, interviewed and released him without the knowledge of the Provincial Security Intelligence Officer (PSIO) and the Officer Commanding Station, which amounted to misconduct. Consequently, the 1st respondent was interdicted on 7th October 1994 and subsequently dismissed from the police force vide letter dated 19th April 1995 on allegations of bribery, gross misconduct and contravention of the operation regulations. The 1st respondent maintained that he arrested the suspect and booked him at Kileleshwa Police Station, interviewed him and wrote a comprehensive report to the Director of Intelligence, which was forwarded to Nyati House by the PSIO Nairobi area, Mr. Kieti, the District Criminal Investigation Officer, and released the suspect because he had a valid Ugandan passport approved by the immigration authorities.

4. The 1st respondent's appeal dated 4th May 1995 against his dismissal was dismissed vide a letter dated 9th May 1996. On 17th September 1998, he appealed to the Head of Public Service and Secretary to the Cabinet, and on 8th July 2009, his appeal was found to be meritorious, the dismissal was found to be improper and the decision to dismiss him was rescinded and he was reinstated to the police service with effect from 7th October 1994. However, clause C of the reinstatement letter stated that the period between 7th October 1994 and the period he resumed duty be treated as leave without pay. Despite the reinstatement, he was not posted to any work station nor was he paid his salary for over 6 years. Ultimately, he retired from service on 24th November 2016.

5. Before the ELRC, in his amended petition dated 18th June 2020, the 1st respondent prayed for, inter-alia: (a) a declaration that his interdiction and subsequent dismissal from the police force was illegal, unfair and unlawful; (b) a declaration that the directive by the Secretary, Public Service Commission dated 8th July 2009 that the period of over 15 years between 7th October 1994 and the date he resumes duty be treated as leave without pay was unfair, illegal and a violation of his right to fair remuneration and legitimate expectation not to be subjected to unfair treatment and a violation of his constitutional rights guaranteed under sections 70, 74 (1), 77 and 84 of the repealed Constitution; (c) an order quashing the said decision; (d) a declaration that he was entitled to his full pay and benefits for the said period of 15 years; (e) unpaid salary for 15 years, being 12 x 15 x 60,000 = Kshs.10,800,000.00 gratuity to be computed by the court, taking into account the said period of 15 years, monthly pension of Kshs.28,407.00 to be reviewed to Kshs.44,230.00 to reflect the said period of 15 years; (f) general damages for violation of fundamental rights; (g) promotions, salary increments allowances and honours commensurate to his position; and (h) costs of the suit.

6. Vide judgment delivered on 5th April 2024, Mwaure, J. allowed the 1st respondent's case and awarded him, inter-alia, compensation for violation of his rights for 10 months based on his salary at retirement and ordered the parties to agree on the salaries and benefits due to him for the years he was out of employment up to the date of reinstatement. The trial court granted the parties time to discuss and

agree on the amounts payable and scheduled the matter for mention on 7th May 2024 to record the agreed figures and issue a final award.

7. Aggrieved by the above decision, the applicants are before this court pursuant to rule 5 (2) (b) of the *Court of Appeal Rules*, 2022. The grounds in support of their claim that their intended appeal is arguable amongst others are: (a) the learned judge erred in law and fact in finding that the amended petition was not time barred;

   (b) the learned judge erred in law and fact by finding that the petitioner's rights to freedom from degrading and inhuman treatment or punishment had been violated, yet he was never detained nor did he prove the allegations; and, (c) the learned judge erred in law and fact by finding that the 1st respondent was entitled to payment of salary for the years he did not work contrary to the new terms of reinstatement contained in the letter dated 19th April 2010.

8. On the nugatory aspect, the applicants averred that if the execution proceeds, the taxpayers will lose a colossal sum of money arising from the erroneous decision by the Superior Court that Section 49 (3) (b) of *Employment Act* applied to the case.

9. In support of the application, the 2nd respondent filed a replying affidavit sworn on 12th July 2024 by one Peter Leley, its Chief Executive Officer. He deponed that the intended appeal is arguable because the trial court erred in applying Section 49 (3) (b) of the *Employment Act* to the petitioner, contrary to Section 3 (2) (b) of the *Employment Act* which expressly excludes members of the Kenya Police Service.

10. On the nugatory aspect, the 2nd respondent deponed that upholding the trial court's decision without a stay would set a problematic precedent regarding the interpretation of statutory provisions governing employment within the National Police Service, which has significant implications on public policy and the management of public resources.

11. The 1st respondent opposed the application vide his replying affidavit sworn on 11th July 2024 in which he maintained that the applicants' appeal is not arguable because the applicants are yet to comply with the trial court's order requiring the parties to agree on the salaries and benefits due for the years he was out of employment to the date of reinstatement to enable the court to issue the final award. Consequently, the trial court is not functus officio and as such, the instant application and appeal are premature because the petition is scheduled for mention on 22nd July 2024 when the parties are expected to furnish the Court with details of the amounts payable to enable he court to issue its final award.

12. On the nugatory aspect, the 1st respondent maintained that the appeal will not be rendered nugatory because the trial court is yet to issue its final award. Therefore, the applicants' apprehension is speculative and a ploy to deny the 1st respondent the fruits of his judgment.

13. When the application came up for virtual hearing before us on 15th July 2024, Ms Mochoge appeared for the applicants, Mr. Watuka appeared for the 1st respondent and Ms Chebet appeared for the 2nd respondent. Even though Ms Mochoge stated that she had filed written submissions dated 26th June 2024, the submissions are not among the documents uploaded in the e-file. Also, Ms Chebet did not file submissions.

14. In her oral submissions, Ms Mochoge, argued that the trial court erred in holding that the 1st respondent was entitled to his salary during the period he had been dismissed. She cited Five Forty Aviation Limited vs. Erwan Lanoe (Civil Appeal 55 of 2016) [2019] KECA 763 (KLR) (Civ) (10 May 2019) (Judgment)) in support of the proposition that a court cannot rewrite a contract between

parties except were coercion, fraud, and undue influence are pleaded and proved. In the circumstances, counsel faulted the learned judge for re-writing the 1st respondent's employment contract.

15. On the nugatory aspect, Ms. Mochoge submitted that if the court computes the amounts payable, then the taxpayers would have been condemned to pay colossal sums of money, which could require a lengthy process to recover should their appeal succeed.

16. In support of the application, Ms. Chebet submitted that the trial court lacked jurisdiction to determine the suit because under Section 3 (2) of the Public Authority Limitations Act, no proceedings founded on contract can be brought against the Government after the end of three years, and argued that in this case the three years had already lapsed.

17. In opposition to the application, Mr. Watuka relied on his written submissions dated 11th July 2024 and maintained that the trial court is yet to issue the final award since the figures payable are yet to be provided, therefore, the trial court is still seized of the matter, hence, this application is pre-mature.

18. We have accorded due consideration to the application, the affidavits in support of and that in opposition to the application, as well as the rival submissions urged before us. The principles that apply in applications under rule 5 (2) (b) of this Court's Rules for stay of execution, injunction or stay of further proceedings pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings in the impugned judgment, decree or order are not stayed.

19. These principles have been enunciated in, among others, the following judicial pronouncements of this Court. On the first limb of the twin principle, this Court held in *Anne Wanjiku Kibeh vs. Clement Kungu Waibara and IEBC* [2020] eKLR that, for stay orders to issue, the applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory (see also *Kenya Tea Growers Association and Another vs. Kenya Planters Agricultural Workers Union* [2012] eKLR; and *Ahmed Musa Ismail vs. Kumba Ole Ntamorua & 4 Others* [2014] eKLR).

20. 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. In considering an application brought under rule 5

    (2)(b) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. (See *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR).

21. In satisfaction of the first prerequisite, the applicants have cited 11 grounds in their draft memorandum of appeal essentially faulting the learned judge for allowing the 1st respondent's claim and for finding that Section 49 (3) (b) of the *Employment Act* is applicable to the 1st respondent contrary to Section 3 (2) (b) of the *Employment Act* which expressly excludes members of Kenya Police Service. In opposition to the application, the 1st respondent maintained that the trial court is yet to make a final determination on the petition and thus it is not functus officio and as such the instant application and the intended appeal are premature.

22. In our view, the application will stand or fall on the question whether it is pre-mature. The issue here is whether as at this point there is a decree capable of being executed or whether the dispute is still alive before the trial court. Put differently, the question is whether there is a decree capable of being stayed

by this Court. The trial court in its judgment allowed the 1st respondent's case and proceeded to state as follows:

> " 80. The Court finds that the petitioner having been reinstated to his employment, he was entitled to his salary and other dues. The respondent clearly reinstated him. If he meant to re-engage him a fresh, he should have made it clear as provided in section 49 (3) (b) of the *Employment Act*.
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> 81. ..
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> 82. As for prayer C and D, the same are justified but contrary to prayers (sic) D, the court orders the parties to agree on the salaries and benefits due to the petitioner for the years the petitioner was out of employment to the date of reinstatement having been a good number of years in order to get more accurate figures with the consensus of the parties. The court will mention the case on 7th May 2024 to receive the figures agreed on and give final award." (Emphasis added).

23. A reading of the above excerpt from the judgment of the trial court shows that the parties were directed to agree on the salaries and benefits due to the 1st respondent and report back to the court for the court to receive the figures and issue a final award. In fact, the learned judge used the word "final" in the above cited paragraph leaving no doubt that the decision was not conclusive. Despite requests by the 1st respondent, the applicants never agreed to meet the applicant's counsel to agree on the figures payable as directed by the trial court. Instead, the applicants instituted the instant application seeking to stay the said judgment and, in the alternative, stay the proceedings before the trial court. The definitive question remains whether there is a final decree capable of being executed warranting stay by this Court.

24. The process of adjudication in a civil suit reaches its conclusion with the passing of Judgment and Decree. Section 25 of the *Civil Procedure Act* requires the court to pronounce judgment followed by a decree. Rules 1 to 6 of Order 21 of the *Civil Procedure Rules*, 2010 deal with judgment which contains a concise statement of the case, points for determination, decision thereon and reasons for such decision. Rules 7 to 19 deals with decrees. As per the scheme of the *Civil Procedure Act* and the Rules, the decree should follow the judgment and must agree with it and it must be self- contained and capable of execution without referring to other documents or pleadings of the parties.

25. As per Section 2 of the *Civil Procedure Act*, a decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. As per the explanation to the above section, a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit settling all the matters in dispute between the parties. It may be partly preliminary and partly final.

26. A 'Preliminary Decree' is not defined in the *Civil Procedure Act*.

However, a reference is found in section 2 of *Civil Procedure Act*, i.e., a Decree can be preliminary, final or partly preliminary and partly final. As the very name suggests, a preliminary Decree will not become final until a final Decree is passed. Therefore, after passing of a preliminary Decree and until the passing of a final Decree, a suit is said to be pending. For this reason alone, upon passing of a Preliminary Decree, the rights of the parties get crystalized but will materialize finally only when the final Decree is passed, which alone is executable. Accordingly, since the trial court is still waiting for the parties to report back to it as directed to pave way for a final award, there is no decree capable of being executed, therefore, an

order of stay of execution would be premature. Therefore, we agree with the 1st respondent's counsel that the applicants' application for stay is premature.

27. Regarding the alternative prayer for stay of further proceeding, we bear in mind the fact that this Court's discretionary power to grant such a relief is exercisable upon consideration of the facts and circumstances of each case. As was stated by this Court in *David*

Morton Silverstein vs. Atsango Chesoni [2002] eKLR each case must depend on its own facts.

27. In any event, it is settled law that stay of proceedings is a drastic order that should only be permitted in extremely rare and deserving cases. In the Halsbury's Laws of England, 4th Edition. Vol. 37, at p.330 and p.332, it is stated:

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.
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> .....
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> This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.
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> It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no
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> cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case".

27. Similarly, in *Marriot Africa International Ltd vs. Margaret Nyakinyua Marigu & 4 Others*, CA No. Nai. E152 of 2022, this Court stated as follows:

> " Whilst this Court has unfettered jurisdiction to issue an order of stay of proceedings, it must be satisfied that there are genuine and compelling grounds to justify such an order, whose effect may be to undermine one of the fundamental constitutional principles, namely that justice shall not be delayed."

27. Talking about the circumstances of this case, it is noteworthy that as at the time of filing this application and even now, the applicants were yet to comply with the orders of the trial court requiring the parties to agree on the salaries and benefits due to the 1st respondent for the years the 1st respondent was out of employment to the date of reinstatement.

28. It is also important to mention that the applicants averred that they risk paying colossal sums of money to the 1st respondent unless a stay of execution and/or further proceeding is granted by this Court. However, the alleged colossal sum is yet to be ascertained. It follows that the applicants have not demonstrated genuine exceptional circumstances or compelling grounds to justify stay of further proceedings before the trial court.

27. Accordingly, having found that the application is pre-mature as earlier explained, we dismiss the application dated 20th May 2024 with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL**

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

Signed.

DEPUTY REGISTRAR.