



Attorney General v Magare-Gikenyi & 3 others (Civil Application E693 of 2024) [2025] KECA 684 (KLR) (11 April 2025) (Ruling)

Neutral citation: [2025] KECA 684 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E693 OF 2024
DK MUSINGA, F TUIYOTT & GV ODUNGA, JJA
APRIL 11, 2025**

BETWEEN

HON ATTORNEY GENERAL APPLICANT

AND

DR MAGARE-GIKENYI 1ST RESPONDENT

PHILEMON ABUGA NYAKUNDI 2ND RESPONDENT

DISHON KEROTI MOGIRE 3RD RESPONDENT

PUBLIC SERVICE COMMISSION 4TH RESPONDENT

(eing an application seeking stay of execution of the Ruling and orders of the Employment and Labour Relations Court of Kenya at Nairobi (Byram Ongaya, J.) dated 11th December 2024 in ELRC Constitutional Petition No. E202 of 2024)

RULING

1. On 11th December 2024, the Employment and Labour Relations Court at Nairobi (Ongaya, J.) in Nairobi ELRC Petition No. E202 of 2024 issued an interlocutory injunction in terms that:

“4. Pending the return date, there be stay of implementation of the promotion decisions conveyed by the internal memo dated 26/11/2024 with exception as it relates to Senior State Counsel (CSG-v 8) and Information Communication Technology Officer 1 (CSG 10).”

2. The Hon. Attorney General, the applicant herein, is aggrieved by those orders and evincing an intention to appeal the decision to this Court has filed a notice of appeal dated 11th December, 2024. The Attorney General says as follows of the impugned order.



3. The order had the effect of a mandatory order which had not been sought by the 1st to 3rd respondents nor had the principles for grant of a mandatory order at an interlocutory stage been met. Further, the applicant, the interested parties and 212 state counsels were condemned without being heard fully or at all, and nothing substantive is left in the petition for determination. In urging that the order went outside the scope of the petition before the ELRC, the applicant states that the court issued orders against 212 state counsels who were not parties to the petition and implementing the orders would amount to condemning the said 212 state counsels without affording them any chance to be heard contrary to the non-derogable right of hearing enshrined under Articles 47, 48, and 50 of *the Constitution*.
4. To demonstrate that the impugned order enlarged the scope of the matter before the High Court, the applicant asserts that the respondents had sought to stay the promotion of the 1st to 15th interested parties from assuming the positions of Senior Deputy Solicitor General and Deputy Solicitor General, yet the trial court stayed all promotions contained in the internal memo dated 26th November 2024 with exception to two positions.
5. The applicant alludes to the role of the Public Service Commission (PSC) in the matter. It is contended that the chairperson of PSC is a member of the Board which approved the promotion of the interested parties and 212 state counsels, and that explains why the PSC shied off from filing an affidavit in the matter. The applicant criticises the trial court for relying on the oral submission of counsel for PSC in reaching the decision without a fair opportunity for rejoinder or rebuttal of the allegations, hence trial by ambush.
6. It is contended, further, that the orders issued by the ELRC cannot be implemented as they have been overtaken by events, as at 11th December 2024 when the orders were issued, promotions conveyed in the internal memo had already been effected, and the officers to benefit had received letters of promotion.
7. Regarding another aspect of the disputed orders, the applicant stated that they were issued based on reliance of illegally obtained and confidential documents against the applicant and interested parties contrary to Articles 31, 35 and 50(4) of *the Constitution* and Sections 6 and 8 of the *Access to Information Act* and the Data Production Act (perhaps the Data Protection Act) as well as the *Evidence Act*.
8. The applicant has, in a notice of motion dated 16th December 2024, sought stay of the impugned orders.
9. This Court is told that unless stay of execution is granted, the intended appeal is likely to be rendered moot and nugatory as the right to fair hearing for over 212 state counsels who were condemned unheard stands to be violated, yet the 1st to 3rd respondents have not offered any undertaking that they will compensate them if the intended appeal succeeds. This should be juxtaposed against the fact that the interested parties herein are civil servants, and any amount paid to them can be recovered from their salary if the intended appeal fails.
10. Shadrack J. Mose, the Solicitor General, who swore an affidavit on 16th December 2024 in support of the motion, also gave a lengthy background of the reasons for the formation of the Advisory Board and its mandate. We need not rehash these as they may not have a direct bearing on the simple matter before us.
11. The response of the 1st, 2nd and 3rd respondents is contained in the replying affidavit of Dr. Magare Gikenyi J. Benjamin sworn on 30th December 2024. Summarized, the trio contend, assert or state that: the decision is that of the Advisory Board, yet the board is neither aggrieved or dissatisfied with the



impugned orders; the impugned orders are temporary; none of the interested parties have challenged the orders; it has not been demonstrated that a competitive process was employed in the questioned promotions; the petition before the Superior Court below has been amended to include all relevant parties; and the promotion letters attached to the motion are illegal and specifically prepared to defeat the cause of justice.

12. The three argue that the intended appeal will not be rendered nugatory if the orders are not granted because: the trial court ordered that PSC intervenes in the promotion dispute and reports back to court, hence the order is not final in nature; the promotions involve a substantial amount of public funds which should only be spent after it is satisfied that the entire process has met constitutional and legal requirements; the affected state counsels will be compensated by payment of backdated pay and salary arrears; and on the other hand, it would be impossible for the affected state counsels to refund the salaries and allowances once paid to them.
13. The 1st to 3rd respondents raised a public interest angle, arguing that it tilts in favour of refusal of stay because: public funds should not be spent on a process that is constitutionally and legally questionable; public interest does not favour allowing and implementing the selective, skewed, and unlawful promotions of state counsels in a manner that does not promote good governance, fair competition and merit; public interest does not favour discriminatory promotion; and public interest does not favour stay orders when the Advisory Board is not aggrieved by the impugned orders.
14. Leaving out what may not be relevant to the proceedings before us, PSC in an affidavit sworn by Remmy N. Mulati on 24th January 2025, contends that the applicant has no locus standi as the decision stayed is that of the Advisory Board, which is not aggrieved; the Solicitor General has no legal authority to speak on behalf of the interested parties; the orders sought to be stayed are conservatory and not final in nature; and the applicant has not demonstrated that there was a competitive process in the impugned promotions. On other matters, PSC echoes the position of the other respondents.
15. We have considered all the material placed before us and the submissions by parties as highlighted and augmented at plenary hearing where Mr Eredi, learned Chief state counsel represented the applicant, Dr Magare was in person, while Mr Ogosso learned counsel appeared for PSC.
16. The decision of this Court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] KECA 378 KLR sets out the principles for grant of stay of execution as follows:

“This Court, in accordance with precedent, has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be nugatory if these interim orders were denied. From the long line of decided cases (although none was cited by counsel, perhaps due to their notoriety) on Rule 5(2) (b) aforesaid, the common vein running through them and the jurisprudence underlying these decisions can today be summarized as follows:

- i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge’s discretion to this court. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.
- ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.



- iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
- iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
- v. An applicant must satisfy the court on both of the twin principles.
- vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
- vii. 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. *Joseph Gitabi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
- viii. 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. *Damji Pragji* (supra).
- ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
- x. 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.
- xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.

17. In addition, because there is a public interest element in this matter, we give regard to the holding of this Court in *Kenya Hotel Properties Limited v Willisden Investments Limited & 6 others* [2013] KECA 370 (KLR) where it states:

“Turning to the issue of whether the appeal raises an arguable point of “public interest”, we wish to pause a question as to when public interest is put in motion. In the case of *East African Cables Limited Vs. The Public Procurement Complaints, Review & Appeals Board And Another* [2007] eKLR the Court of Appeal indicated situations where public interest should take precedence in the following words:

“We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the



greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable”

Further in the case of; Kenya National Examination Council – v- R exp. Kemunto Regina Ouru Nairobi Civil Appeal No. 127 of 2009 and Kenya Power & Lighting Co. –v- NMG Limited & 2 Others, Nairobi Civil Application No. 27 of 2010, it was stated that public interest overrides private individual's interest.”

18. We have little doubt that the intended appeal is arguable. Just for illustration, the contention made that the impugned orders affect 212 state counsels without giving them an opportunity to be heard is not a frivolous argument and is worthy of further consideration at the hearing of the intended appeal.
19. As to whether the appeal will be rendered nugatory if the orders sought are declined, the applicant makes four arguments which we consider in turn.
20. It is submitted that if stay is not granted then over 212 State counsels will be condemned unheard. It may very well be a strong argument that in so far as the impugned orders affect the 212 state counsels who were not parties to proceedings before the trial court, they were condemned unheard. Yet it is common ground that the petition has now been amended on 12th December, 2024 to include the 212 affected state counsels as interested parties. If aggrieved by that decision, then the 212 affected state counsels can move the trial court for setting aside orders. Simply, they are not without remedy and they do not need a stay order to assist them seek redress.
21. An argument is made that the 1st to 3rd respondents are private citizens whose source of income remain unknown and have not made any undertaking to compensate the 15 interested parties and 212 state counsels in the event the intended appeal succeeds. This too, is for the trial court. It is before that court that an adequately secured undertaking can be sought from the three respondents. It is unclear to us whether the issue was raised at all during the hearing for grant of conservatory orders.
22. The third and fourth arguments can be considered together. It is contended that some officers who were promoted are on the verge of retirement, having been left with a few years to serve and will, therefore, be highly prejudiced and will suffer irreparable loss unless stay is granted. Also, likely to suffer similar fate are those who have been serving in acting capacity for a very long period of time. To ask them to rescind the acting positions would be unfair and unjust, it is asserted.
23. These twin arguments require us to balance whether public interest is served by granting or refusing the stay. A question has been raised about the legality of the promotions of the interested parties and the numerous state counsels. The trial court thinks this question to be serious enough to warrant temporary freeze of implementation of those promotions pending a fully-fledged inquiry into the question. And although we are told that the promotions have been communicated to the beneficiaries, there is no evidence that the promotions had been effected by the time the impugned order was issued. Mr Eredi’s offer to avail copies of payslips of the affected officers to prove the implementation came a tad too late as it was made in the middle of the plenary hearing of the motion. It seems to us that public interest is better served by putting a hold on those promotions until they are pronounced to pass constitutional and legal muster by a court of law, because any loss suffered by the interested parties and affected state counsels can be compensated by payment of salary in arrears. Yet, because it is inimical to public interest that the question of promotions of such a large number of public servants lingers on unresolved for an unnecessarily long time, the hearing of the petition should be expedited.
24. We dismiss the notice of motion dated 11th December, 2024 with no order as to costs. A further order we make is that the petition before the ELRC be heard and determined on priority basis.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL 2025.



D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

