



Kenya Literature Bureau v Kerubo & another (Civil Application E683 of 2024) [2025] KECA 669 (KLR) (11 April 2025) (Ruling)

Neutral citation: [2025] KECA 669 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E683 OF 2024
FA OCHIENG, WK KORIR & JM NGUGI, JJA
APRIL 11, 2025**

BETWEEN

KENYA LITERATURE BUREAU APPLICANT

AND

CATHERINE WANJIRU KERUBO 1ST RESPONDENT

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

(Being an application for stay of execution of the judgment of the Employment and Labour Relations Court (Wasilwa, J.) dated 26th November, 2024 in ELRC Petition No. E099 of 2024)

RULING

1. In the notice of motion dated 4th December 2024, the applicant, Kenya Literature Bureau (KLB), seeks an order staying the execution of the judgment delivered on 26th November 2024 by Wasilwa J. in Nairobi Employment and Labour Relations Court (ELRC) Petition No. E099 of 2024 pending the hearing and determination of its intended appeal. The application, which is supported by an affidavit sworn by the applicant’s Acting Managing Director, Julius Aritho, also beseeches stay of further proceedings in the matter before the trial court. The application is opposed by the 1st respondent, Catherine Wanjiru Kerubo, and the 2nd respondent, the Public Service Commission.
2. The applicant avers that its intended appeal is arguable and proceeds to list a myriad of grounds, including a challenge to the 1st respondent’s locus standi, alleged disregard of the evidence of the applicant by the learned Judge, and the award of costs to the 1st respondent. The applicant also deposes that by quashing the acting managerial appointments, which were made according to the approved Human Resource Instruments (HR Instruments), the impugned judgment created a vacuum that hinders its seamless operations. The applicant highlights its critical role in the publication and supply of learning materials to schools, arguing that disruption of its operations would severely impact revenue and operations, including the budgetary and contractual commitments based on the new structure.



KLB emphasizes that it is a self-sustaining state corporation that finances its operations internally and pays dividends to the National Treasury, highlighting the need for profitability and competitiveness. The applicant also states that the temporary appointees have already assumed their roles, accepted new job descriptions, and set performance targets, and disrupting this arrangement risks halting its operations. The applicant is apprehensive that the 1st respondent has already begun the enforcement process by filing a Bill of Costs, making stay necessary to prevent the intended appeal from becoming meaningless and to avoid the potential loss of public funds. Finally, the applicant argues that it is in the interest of justice, fairness, and the public to allow the implementation of duly approved HR Instruments to continue undisturbed, hence necessitating the grant of an order of stay.

3. In opposition to the application, the 1st respondent swore an affidavit on 13th December 2024 in which she avers that the applicant's draft memorandum of appeal does not raise any arguable ground of appeal, and the intended appeal has no chance of success. She deposes that the applicant should not be allowed to continue breaching Articles 10 and 234 of *the Constitution* and that the judgment contained valid reliefs/orders that protect the public interest, the rule of law, and the doctrine of constitutionalism, and public interest will be gravely prejudiced if the stay is declined. As to whether or not the intended appeal will be rendered nugatory should the order sought not be granted, the 1st respondent avers that quashing the acting appointments does not create a vacuum in the applicant's operations because the applicant has been utilizing the skills and expertise of its senior management staff since 2018 and has posted commendable performance as attested by the applicant in its annual financial statements over the years. She additionally avers that the applicant has not demonstrated how the new organizational and grading structures would improve the applicant's performance. The 1st respondent concludes that the public interest and the applicant's staff stand to suffer significant loss and grave prejudice if the execution of the judgment is stayed and that such an order will result in grave violation of *the Constitution*.
4. The 2nd respondent's response came through the replying affidavit sworn on 24th January 2025 by its Secretary/Chief Executive Officer, Mr. Paul Famba. Mr. Famba's deposition highlighted the Commission's powers to guide the development and approval of human resource instruments by state corporations and public universities, including the applicant. He deposed that the appointments by the applicant should align with the approved Human Resource Instruments of 28th June 2024, and section 34 of the *Public Service Commission Act*. He avers that following the filing of the petition, the Commission wrote to the applicant on 17th July 2024, directing that acting appointments must comply with the approved Organizational Structure, Grading Structure, Staff Establishment, Career Guidelines, and relevant sections of the *Public Service Commission Act* and regulations. The Commission also directed the applicant to advertise acting positions competitively, but the applicant had not advertised these positions as advised. Further, that even though the Commission approved the applicant's Career Guidelines during its meeting of 19th June 2024, the approval was communicated to the applicant vide a letter dated 9th July 2024. He points out that the Commission had not approved the applicant's Career Guidelines by 28th June 2024, as approved Career Guidelines were only forwarded on 9th July 2024. He finally states that the applicant had no basis for the job purpose, functions, duties, responsibilities and requirements for the acting appointments made on 28th June 2024.
5. When the application came up for hearing on 28th January 2025, learned counsel Ms. Wataka appeared for the applicant while Mr. Karauka and Mr. Odukenya appeared for the 1st and 2nd respondents, respectively. Having filed their submissions, Ms Wataka and Mr. Karauka relied on them, accompanied by brief oral highlights in the plenary, while Mr. Odukenya made oral submissions.
6. Relying on her submissions dated 7th January 2025, learned counsel Ms. Wataka reiterated the applicant's assertion that the intended appeal was arguable and that it would be rendered nugatory if



an order of stay was not issued. Submitting on the arguability of the applicant's intended appeal, Ms. Wataka stated that at the core of the intended appeal was the question of the 1st respondent's locus standi and whether the applicant's evidence was considered by the trial Judge. Counsel also indicated that the applicant would contest the issuance of an injunction restraining the implementation of the HR Instruments pending public participation, asserting that the learned Judge did not explicitly address the issue of public participation in the development of the Instruments.

7. On whether the intended appeal would be rendered nugatory should the impugned judgment not be stayed, Ms. Wataka submitted that stopping the implementation of the HR Instruments would create a vacuum in the operations of the applicant, which will be prejudicial because the temporary acting appointments had already been communicated to, and accepted by the appointees. Counsel emphasized that the applicant being a statutory body involved in developing, publishing, and distributing primary and secondary school textbooks, it is in the public interest to stay the execution of the impugned judgment in order for the operations to continue seamlessly without interruption. Reliance was placed on the decision in *Equity Bank Limited vs. West Link Mbo Limited* [2013] eKLR for the proposition that in considering an application for stay of execution of judgment, the Court should exercise its discretion to preserve the substance of the appeal and prevent injustice from being occasioned to the applicant. Counsel consequently prayed that the application be allowed as prayed.
8. In opposition to the application, learned counsel for the 1st respondent, through the submissions dated 20th January 2025, argued that the applicant had not shown any cogent, valid, and reasonable ground to demonstrate that the intended appeal would be prejudiced or become irrelevant if a stay was not granted. According to counsel, allowing the applicant to continue breaching the law will not be in the public interest, and that the High Court had affirmed statutory provisions in its judgment. Counsel submitted that the applicant had not tendered any evidence to show how it would suffer if a stay order is not granted. Mr. Kurauka maintained that even without a stay order, the intended appeal would not be rendered pointless and that any potential negative consequences for the applicant are not of a magnitude that would nullify the appeal's purpose. Mr. Kurauka finally urged that the acting appointments had lapsed, and those appointed to those positions should have ceased acting. He subsequently urged for the dismissal of the application with costs.
9. Learned counsel Mr. Odukenya reiterated the contents of the 2nd respondent's replying affidavit and submitted that the Commission's position was that, yes, it approved the HR Instruments, but in piecemeal, yet the applicant proceeded to appoint persons in acting capacity before receiving the Career Guidelines on 9th July 2024. Counsel submitted that since the acting positions were filled on 28th June 2024 for 6 months, the acting period should have expired on 28th December 2024. Counsel, therefore, argued that this application had been overtaken by events.
10. It is now well-established that for this Court to grant an order of stay of execution, an injunction or stay of any further proceedings under Rule 5 (2) (b) of the Court of Appeal Rules, an applicant must demonstrate that the intended appeal is arguable and not frivolous, and, that absent stay orders, should the appeal or intended appeal eventually succeed, it would be rendered nugatory. Thus, in *Montague Charles Ruben & 9 others vs. Peter Charles Nderito & Another* [1989] KECA 70 (KLR) it was held that:

“In dealing with Rule 5(2)(b) applicants, this Court exercises original jurisdiction, and this has been so stated in a long line of cases decided by this Court. Once an applicant has properly come before the Court, the Court has jurisdiction to grant an injunction or make an order for a stay on such terms as the Court may think just. We have to apply our minds *denovo* (anew) on the propriety or otherwise of granting the relief sought. And as we have



always made clear, this exercise does not constitute an appeal from the trial judge's discretion to ours. In such an application, the applicant must show that the intended appeal is not frivolous, or put the other way round, he must satisfy the court that he has an arguable appeal.

Secondly, it must be shown that the appeal, if successful, would be rendered nugatory: See Stanley Munga Githunguri vs. Jimba Credit Corporation Ltd Civil Application NAI 161 of 1988.”

11. The principles enunciated above form the basis upon which this application will be determined. From the averments and submissions made in this case, we have no doubt that the appeal is arguable. At the centre of the dispute is the 2nd respondent's approval of the HR Instruments upon which the appointments were made. According to the applicant, it will, in its intended appeal, be questioning the 1st respondent's locus standi to institute the petition. In our view, and without going into the nitty gritty of this ground of appeal, this is an arguable point worthy of consideration and determination by the Court. For the purposes of this ruling, we have isolated this single ground, well aware that even one single bona fide point is sufficient to satisfy the first of the two requirements that an applicant must satisfy in an application of this nature.

12. Turning to the second obligation, the question to be answered is whether the intended appeal will be rendered nugatory should the application for stay of execution be declined. The meaning of an appeal being rendered nugatory was explained in Registered Trustees of the Anglican Church of Kenya vs. James Maina Maigwa & 2 Others [2017] KECA 426 (KLR) as follows:

“The term nugatory, from the Latin ‘nugatorious’ means something worthless or futile, one that is trifling or of no value. The term has to be given its full meaning, and it is always a question of fact dependent on the peculiar circumstances of each case. See Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 232. An appeal may thus be said to be nugatory if its eventual success turns out to be merely academic by reason of some great harm, loss or prejudice having occurred in the interim.”

13. In Hashmukhlal Virchand Shah & 2 others vs. Investment & Mortgages Bank Limited [2014] KECA 548 (KLR), the Court pointed out that:

“As for the second requirement, we have to ensure that the word “nugatory” has been given its full meaning, namely that the appeal will not be rendered worthless, futile; invalid or even trifling (Reliance Bank Ltd vs. Nor Lake Investment Ltd [2002] IEA 227. Secondly we have to consider whether what has been sought to be stayed is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

14. Orders 2, 4, and 5 issued by the trial court, which appear to offend the applicant, are couched as follows:

“2. An injunction to prevent the Respondents from implementing new Human Resources instruments until the same are subjected to public participation, consultation and views of staff, prior to implementation and approval by the Interested Party hereof.

3.

4. A declaration to be issued to the effect that the appointments of the Acting General Manager, Publishing and Production; Acting General Manager, Finance & Commercial Services; Acting General Manager, Human Resources



and Administration; Acting Manager, Planning and Risk Management; Acting Manager, Marketing; Acting Manager, Information, Communication Technology; Acting Manager, Production; Acting Manager, Supply Chain and Acting Assistant Manager, Administration made by the Respondents on 28th June, 2024, was invalid, null and void ab initio.

5. An order of certiorari be issued quashing the Respondents' appointments of the Acting General Manager, Publishing and Production; Acting General Manager, Finance & Commercial Services; Acting General Manager, Human Resources and Administration; Acting Manager, Planning and Risk Management; Acting Manager, Marketing; Acting Manager, Information, Communication Technology; Acting Manager, Production; Acting Manager, Supply Chain and Acting Assistant Manager, Administration made by the Respondents on 28th June, 2024.”
15. At the hearing of the application, it was stated by Mr. Kurauka and Mr. Odukenya, and without any resistance from Ms. Wataka, that the acting appointments subject to the dispute were to lapse within six months from 28th June 2024. This automatically addresses the apprehensions in relation to the effect of the 4th and 5th orders. In respect to the 2nd order, the applicant takes an interesting position that without an order staying the execution of the impugned judgment, the operations of the applicant will be halted as it will be forced to recall or rescind the appointments it had made under the new HR Instruments. However, we note that the applicant has not provided details of how many appointments have been made under the impugned HR Instruments. Indeed, the applicant gave the impression that it is only the acting appointments that were made under the HR Instruments. That being so, and pursuant to our finding on the fate of the 4th and 5th orders, it means that there is nothing to be affected by the order of the trial court stopping the implementation of the HR Instruments until they are subjected to public participation, passed through the applicant's members of staff and approved by the 2nd respondent. Therefore, we fail to see how failure to grant the order of stay will halt the applicant's operations. In other words, there is no evidence that the appeal will be rendered nugatory.
16. The circumstances herein share resemblance to those in *National Assembly & 47 others vs. Okoiti & 169 Others* [2024] KECA 39 (KLR) where the Court observed that:
 - “ 62. It has also been argued that some government departments may shut down and jobs will be lost. However, details of the alleged jobs were not provided. The applicants left it to the court to fill the gaps. We cannot do so without appearing to descend into the arena of the dispute. We decline the invitation to do so. It was also argued that over 1000 statutory instruments would lapse come January 2024. In opposition to this argument, the respondents argued that Parliament knew the life span of these statutory instruments, but it only extended their life span for one year in 2022. We have carefully addressed our minds to this ground guided by the judicial definition of what amount to nugatory. We are not persuaded that the substratum of the appeal will be destroyed. In any event, nothing stops Parliament from re-enacting the statutory instruments.
 64. A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. The general attitude



of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose.”

17. We, therefore, find that the applicant herein has not established how the intended appeal will be rendered nugatory. Consequently, the notice of motion dated 4th December 2024 lacks merit and is for dismissal, and we hereby dismiss it.
18. Considering that this application arises from a constitutional petition filed in the public interest, and taking into account that no appeal has been filed, we order the parties to bear their costs for the application.

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

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

