



REPUBLIC OF KENYA



KENYA LAW
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**Teachers Service Commission v Boniface (Civil Application
E080 of 2024) [2025] KECA 1107 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1107 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E080 OF 2024
JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA
JUNE 20, 2025**

BETWEEN

TEACHERS SERVICE COMMISSION APPLICANT

AND

JANE WANGARE BONIFACE RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an appeal from the Judgment and Decree of the Employment and Labour Relations Court at Nyeri (O. Makau, J.) delivered on 6th August, 2024 in E.L.R.C. Cause No. E014 of 2023)

RULING

1. By an application dated 21st August 2024, brought under rule 5 (2)(b) and 49 of the Court of Appeal Rules among others, the applicant, Teachers Service Commission seeks orders:

“That the Honorable Court be pleased to order a stay of execution of the Judgment of O. Makau, J. delivered on 8/04/2024 in ELRC Cause No. E014 of 2023: Jane Wangare Boniface -vs- TSC & AG, and all the consequential orders pending the hearing and determination of the intended Appeal;

Costs be provided for.”

2. A brief background of the application is that the respondent, Jane Wangare Boniface filed a claim before the Employment and Labour Relations Court [ELRC] seeking various reliefs. Judgment was rendered in favour of the respondent. The court made, inter alia: orders lifting the interdiction/suspension and for reinstatement of the Claimant's service of the respondent as a Principal with effect from February 2020 up to 14th December 2021, without a break in service with full benefits; an order for payment of all irregularly recovered/withheld salary, as well as the benefits and annual increments and promotions for the period she was on interdiction; an order to pay the outstanding irregular



recoveries of Kshs.321,370; an Order for exemplary damages of Kshs.2,000,000; and an Order of payment of transfer allowance amounting to Kshs.112,058.

3. The applicant was aggrieved by the judgment and filed a notice of appeal, sought for proceedings of the trial court, and filed the instant application seeking the aforementioned orders. It has annexed the draft memorandum of appeal to this application. The application is supported by an affidavit dated 22nd August 2024, sworn by Mr. Mollet Sango, the Deputy Director of Human Resources Management & Development at the applicant's office. It is contended that the appeal has high chances of success as demonstrated by the draft memorandum of appeal annexed to the affidavit. Further, it is averred that the applicant is apprehensive the respondent may commence execution to enforce the judgment hence rendering the appeal nugatory. He avers that if execution is allowed to proceed the applicant will be exposed to numerous adverse actions, further that the respondent may not be able to refund money paid under the judgment. It is further contended that no prejudice will be suffered by the respondent if stay is granted and that the applicant is capable of satisfying the court decree if the appeal fails.
4. The respondent filed a replying affidavit in which she vehemently opposes the application. It is dated 6th September 2024. She contends that contrary to the averment by the applicant that she is a person of straw, she is a person of means and will be in a position to reimburse the monies which will have been paid to her if the appeal succeeds. She has annexed her pay slip in support of her averment that she has worked and is still working for the appellant since 22nd December, 1997 and has risen to the rank of a Principal with a cumulative total earnings of Kshs.179,215.00 and therefore, the issue of inability to refund the decretal sum is non-issue.
5. The application was heard through this Courts virtual platform on the 28th January 2025. Learned counsel Mr. Gori of Gori, Ombongi & Co. advocates was present for the respondent. Mr. Allan Sitima, learned counsel for the applicant was absent, however, we were satisfied that he was duly served with the hearing notice on 3rd January 2025. Both counsel filed their submissions. In brief submissions, Mr. Gori urged us to dismiss the application for failing to meet the requisite standard for the orders sought, urging further that the application was based on contentious issues.
6. We have considered this application, the affidavits filed for and against the application, together with the submissions as filed and the law. We continue to emphasize that to merit an order of stay, an applicant must satisfy the Court that first, he has an arguable appeal, which means one that raises a bona fide point worthy of consideration, though it must not necessarily succeed and second, that if the stay is not granted the appeal, if successful, would be rendered nugatory. See Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR.
7. In support of the first principle of whether the applicant has an arguable appeal, the applicant submits that the awards granted to the respondent are unmerited and unprecedented in law. It contends that the learned trial Judge awarded the respondent damages that were manifestly excessive and out of tune with the established law and judicial precedents in analogous cases. Further, in granting the damages, the Judge erred in law and, in fact, in awarding exemplary damages that were manifestly and so inordinately high and not in tandem/commensurate with the respondent's injury, if at all.
8. The respondent, on the other hand, submits that the issues raised by the applicant carry no weight whatsoever, as there has been no single bona fide issue raised that can be deliberated upon by this Court. That the issues raised are out of pure conjecture and speculation on the part of the applicant with an aim to discredit the respondent's honest and sincere complaints on the violation of her rights as an employee and human being.



9. We have considered the issues raised by the applicant in support of arguability of the appeal. Without making any firm conclusion on the issue, we agree that the applicant may have a point on the issue of the nature and extent of the damages awarded. Whether it that will succeed on appeal is not for us to determine at this stage.
10. On the nugatory aspect, the applicant submits, the Court is invited to consider the factual position that the trial court has awarded substantial sums to the respondent, amounting to over Kshs.6,000,000/= plus costs and interest. The applicant contends that it may not recover the decreed sums if the appeal succeeds, and urges that it has made a case necessitating the preservation of the substratum of the subject matter pending the hearing and determination of the appeal in the interest of justice. It has averred further in the grounds on the face of the application that the respondent may not be able to refund the amount of costs and any money paid to her under the judgment if the applicants' appeal is successful.
11. The respondent has challenged the applicant's arguments in support of the nugatory aspect, and has contended that the applicant has not shown the substantial loss they would suffer if the money is paid to the respondent. It was urged that that was an important element to prove when an order for stay of execution is sought and for that proposition placed reliance on the case of Kenya Shell Limited vs. Benjamin Karuga Kibiru & Another [1986] eKLR:

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay....

Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money..... In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted.”

12. Counsel for applicant urged that the subject matter of the appeal would not be interfered with if the stay of execution is not granted as what is sought to be stayed can be reversed, and an award of damages would be adequate. Counsel urged that the award by the court is in the form of money that can be transferred back to the applicant in the event the appeal is successful. For that proposition, he relied on the celebrated case of Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others (supra) this Court held:

“(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.”

13. Counsel urged that the respondent is a person of means, and thus well capable of refunding the decretal sum. He submitted that the respondent is a Principal and earns a monthly salary of Ksh.179,215.00, a matter well within the knowledge of the applicant. Further, counsel urged that the applicant has not in any case shown that paying the decretal sum would occasion them any undue hardships. For that proposition the respondent relies on the case of Transouth Conveyors Limited vs. Kenya Revenue Authority & Another [2007] eKLR where the Court stated that:

“As in cases where a judgment-debtor is adjudged to settle a substantial money decree, it has become necessary for the court to qualify the usual principle that the success of a Money Decree, so long as it is certain that the respondent was capable of repaying the decretal sum, would not render an intended appeal nugatory. The qualification has to do with the interests



of justice where undue hardship would be caused to the applicant if stay is refused purely on grounds that he can be monetarily compensated.”

14. Considering the grounds raised and urged by the applicant in support of the nugatory aspect, we note their apprehension that the decree amount is colossal, and being a public body, that amount will come from tax payers money, raising public interest concerns. Two issues are paramount in the circumstances; one, whether the applicant will be subjected to undue hardship in paying the judgment decree; and two and equally important whether the respondent will be able to refund the amount paid out to them if the appeal succeeds, in which case, what the respondent seeks to stop in this application will be capable of being reversed.
15. The applicant did not raise the issue of hardship in meeting the judgment decree, however, we note that the amount is colossal and given that it will come from public coffers the public interest should be considered and cannot be ignored. The fact it is public funds also means that the amount may not be readily available to the applicant.
16. Even though the respondent has stated on oath that she is a person of means and has also attached her pay slips in support of her earnings, which she says she has been earning to date since 1997, we are nonetheless satisfied, in the circumstances of this case that the applicant merits the orders it has sought. We are satisfied that the respondent does not stand to suffer any prejudice as she is still earning her salary as indicated in her affidavit. Furthermore, she will be adequately compensated if the appeal fails.
17. The application dated 22nd August 2024 is therefore allowed. Costs to abide the outcome of the appeal.

DATED AND DELIVERED AT NYERI THIS 20TH DAY OF JUNE, 2025.

J. LESIIT

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JUDGE OF APPEAL

ALI - ARONI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

