



**Article 19; Global Campaign for Free Expression v Waswa (Civil Application E073 of 2022) [2024] KECA 139 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KECA 139 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E073 OF 2022  
DK MUSINGA, W KARANJA & MSA MAKHANDIA, JJA  
FEBRUARY 16, 2024**

**BETWEEN**

**ARTICLE 19; GLOBAL CAMPAIGN FOR FREE EXPRESSION ..... APPLICANT**

**AND**

**SANDRA M. WASWA ..... RESPONDENT**

*(An application for stay of execution of the Orders of Employment and Labour Relations Court at Nairobi (M. Onyango, J.) dated 23rd February, 2022 in ELRC Cause No. E572 of 2021)*

**RULING**

1. By way of a notice of motion dated March 9, 2022 and which is brought pursuant to the provisions of rule 5 (2) (b) of the *Rules of this Court*, the applicant seeks an order of stay of execution of the orders of the Employment and Labour Relations Court at Nairobi (M. Onyango, J.) dated February 23, 2022 in ELRC Case No. E572 of 2021 pending the hearing and determination of an intended appeal.
2. The background to this application is that the respondent was an employee of the applicant, having been employed on April 13, 2011 as a senior programme officer, access to information on contract basis and at a monthly salary of Kes 180,000/=. She contended that she executed her duties diligently, leading to her elevation to the position of Senior Programme Officer - Access to Information, Article 19 Eastern Africa. Following her new position, her monthly salary was reviewed upwards to Kes 314,049/= . Her contract was extended until June 30, 2020.
3. She stated that upon her contract lapsing on June 30, 2020, she continued to serve the applicant in the same capacity and without changes in salary until March 8, 2021 when the applicant terminated her employment by giving her one month's notice. She was then earning a monthly salary of Kes 358,343.41. She contended that the applicant had expressly and/or impliedly promised to formally renew her employment contract upon its expiry. She further contended that her termination was unfair, discriminatory, and guised redundancy that singled her out from other staff members. In her



- suit, she sought a declaration that her termination was illegal and unlawful; an order for reinstatement without loss of any benefits; in the alternative to reinstatement, payment of the accrued dues which she tabulated; exemplary and punitive damages and costs of the suit.
4. In its decision rendered on February 23, 2022, the trial court held that the respondent was in employment for more than nine months after lapse of the contract. She was therefore on a month to month open ended contract and was entitled to be subjected to the provisions of sections 41 and 43 of the [Employment Act](#) which provide for fair hearing and valid reason for termination of contract. The court further held that the applicant had not shown any genuine reason for terminating the respondent's employment and entered a finding that her termination was unfair for both invalid reason and want of fair procedure. The court awarded her Kshs.358,343.41 as one month pay in lieu of notice and Kshs.3,583,434.10 as 10 months' salary compensation, bringing the total award to Kshs.3,941,777.51.
  5. It is the impugned decision highlighted hereinabove that set the stage for this application. The application is supported by the grounds borne on the face thereof and in the affidavit in support sworn by Mugambi Kiai, the applicant's regional director. It is contended that the intended appeal is arguable as demonstrated in the draft memorandum of appeal annexed to the supporting affidavit. The applicant faults the learned judge for, *inter alia*, making a finding that the respondent was unfairly terminated from her employment when in fact the existing fixed term contract between the parties had lapsed by effluxion of time; failing to consider that the respondent had failed to sign the proposed contract offered to her by the applicant, thereby making it impossible for a contractual relationship to exist; making a finding that the contract between the parties was on a monthly basis and thereafter proceeded to award maximum compensation of ten months' salary; and by holding that the applicant was obligated to give reasons for termination in a fixed term contract whereas the contract had lapsed by effluxion of time.
  6. We were urged to find that on the basis of the grounds enumerated above, the intended appeal is arguable and the issues raised should be ventilated on appeal.
  7. As to the nugatory aspect, it was contended that unless stay orders are given, the applicant will suffer irreparably as it will be compelled to satisfy the decree from donated funds that are meant to run specific charitable activities in the country. The applicant also decried the respondent's ability to refund the decretal sum in the event the intended appeal is successful hence the need to stay payment of any decretal sums pending the hearing and determination of the intended appeal.
  8. The respondent opposed the application by way of a replying affidavit wherein she deposed that the instant application is frivolous, vexatious and a total abuse of the court process. She further stated that the application is grossly misconceived and lacking in merit, fundamentally defective and a delay tactic. On arguability of the intended appeal, she deponed that the applicant is misguided on the law regarding compensation for unfair termination of employment and that the learned judge correctly applied the law, the facts and evidence in arriving at her decision. In a nutshell, she contended that the intended appeal is not arguable at all.
  9. On nugatory aspect, she averred that contrary to the allegations of her impecunity, she runs a poultry business and therefore she is capable of paying back the decretal sum should the intended appeal be successful. In sum, she contended that the applicant has not satisfied the two limbs required for grant of an order of stay of execution.
  10. In urging the application, the applicant filed written submissions dated March 18, 2022 wherein it contended that the two limbs on arguability and nugatory aspect have been satisfied. Equally, the



respondent vide written submissions dated March 21, 2022 urged us to find that the twin principles for consideration in an application under rule 5 (2) (b) have not been established.

11. We have considered the application, the replying affidavit, the written submissions by both parties as well as the applicable law. It is now well established that in an application of this nature, an applicant must satisfy this Court that the appeal or intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR. 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. See *Joseph Gitabi Gachau & another v Pioneer Holdings (A) Ltd & 2 others*, Civil Application No 124 of 2008. Even one arguable ground of appeal will suffice.

See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No Nai 345 of 2004.

12. The applicant contended, *inter alia*, that a fixed term contract lapses by effluxion of time and therefore the trial court erred by making a finding that the respondent was unfairly terminated whereas the period of her employment had lapsed. Another issue raised by the applicant is that despite making a finding that the contract between the parties was on a monthly basis, the trial court proceeded to award compensation of ten months' salary. These, in our view, are arguable issues, which do not appear to us idle. They require to be interrogated on appeal. On this basis, we are satisfied that the intended appeal is not frivolous. The applicant has therefore satisfied the limb of arguability.
13. On nugatory aspect, we are cognizant of the fact that 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. The applicant has contended that if it were compelled to satisfy the decree, it would utilize donated funds which are meant for specific charitable projects and hence it would suffer irreparably. This argument is in our view plausible.
14. The applicant has also raised doubts of the respondent's ability to repay the decretal sum in the event the intended appeal is successful. In rebuttal, the respondent contends that she has been running a poultry business for about 10 years and that she is therefore capable of refunding the decretal sum.
15. This court in *International Laboratory for Research on Animal Diseases v Kinyua* [1990] eKLR held that where it is alleged by an applicant that an appeal will be rendered nugatory on account of the respondent's impecuniness, the onus shifts to the latter to rebut the allegation. The court further held that such an allegation calls for rebuttal evidence from the respondent. In this case, save for stating that she has the necessary means, the respondent has not adduced an iota of evidence of her financial means. In the circumstances, therefore, it is doubtful whether she will be in a position to refund the decretal sum should the intended appeal be successful.
16. In the upshot, the applicant has satisfied both limbs of the requirements under rule 5 (2) (b) of this *Court's Rules*. We therefore grant stay of execution of the orders of the Employment and Labour Relations Court dated February 23, 2022 pending the hearing and determination of the intended appeal. Costs of the application to abide by the outcome of the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**D. K. MUSINGA, (P)**

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**JUDGE OF APPEAL**



**W. KARANJA**

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR.**

