



**Principal Secretary, Ministry of Interior and Coordination of National  
Government & another v Kaguthi & 11 others (Civil Application  
E298 of 2023) [2024] KECA 96 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 96 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E298 OF 2023  
SG KAIRU, F TUIYOTT & JW LESSIT, JJA  
FEBRUARY 9, 2024**

**BETWEEN**

**PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND COORDINATION  
OF NATIONAL GOVERNMENT ..... 1<sup>ST</sup> APPLICANT  
ATTORNEY GENERAL ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOSEPH KAGUTHI ..... 1<sup>ST</sup> RESPONDENT  
SALIM NDEMO ..... 2<sup>ND</sup> RESPONDENT  
FRANCIS K. SANG ..... 3<sup>RD</sup> RESPONDENT  
MAJOR (RETIRED) RAMA NDEGWA MWANGOMBE ..... 4<sup>TH</sup> RESPONDENT  
IBRAHIM DUALE ..... 5<sup>TH</sup> RESPONDENT  
NURIA ABDULAH I ..... 6<sup>TH</sup> RESPONDENT  
FRANCIIS CHARLES MUGAMBI ..... 7<sup>TH</sup> RESPONDENT  
ZIPPY NZISA MUSYIMI ..... 8<sup>TH</sup> RESPONDENT  
NANCY WAMBUI GACHOKA ..... 9<sup>TH</sup> RESPONDENT  
IMANUEL ICHOR IMANA ..... 10<sup>TH</sup> RESPONDENT  
PURITY SEIN KARARIET ..... 11<sup>TH</sup> RESPONDENT  
CAREN WAKOLI ..... 12<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution and stay of proceedings against  
the ruling of the Employment and Labour Relations Court at Nairobi*



## RULING

1. Before this Court is an application dated 5<sup>th</sup> July 2023 brought under Article 22, 23, 156(4) and (6), 159(2), 164 (3) of the *Constitution*, sections 3, 3A and 3B of the *Appellate Jurisdiction Act*, and rules 5(2) (b), 42 and 47 of the *Court of Appeal Rules*. The applicants, Principal Secretary, Ministry of Interior and Coordination of National Government and The Hon. Attorney General substantially seek stay of execution of the ruling and judgment of the Employment and Labour Relations Court (ELRC) delivered in Nairobi by Nzioki, J. dated 27<sup>th</sup> October 2022 and 25<sup>th</sup> April 2023 in ELRC Petition No. 84 of 2020; Secondly, they seek stay of proceedings in the High Court Judicial Review Misc. suit No. E065 of 2023 pending the hearing and determination of the intended appeal.
2. A summary of the relevant facts leading to the impugned judgment of Nzioki, J. is that the respondents; members of the National Committee on the Implementation of Citizen Participation in Security, appointed by the 1<sup>st</sup> applicant on 7<sup>th</sup> November, 2015 on specific terms for the period between 2016 to 2018, through their petition dated 3<sup>rd</sup> June 2020 filed a suit and sought for the following reliefs against the applicants:
  - a. A declaration that the respondents’ constitutional rights have been violated by the applicants;
  - b. a declaration that the applicants had no constitutional and/or statutory right to unlawfully withhold the payment of the respondents’ accrued payment as set out in the attached schedule hereto without proven valid reasons for doing;
  - c. an order directed to the applicants to pay the respondents payment as set out in the schedule annexed hereto;
  - d. a declaration that the respondents are entitled to damages to be paid by the applicants to be assessed by the honorable court; and,
  - e. any other favourable order that the court may grant.
3. On the other hand, the applicants filed a cross- petition/counterclaim and sought the following orders against the respondents:
  - a. A declaration that the respondents in the years 2017 and 2018 received an overpayment of 11 days sittings in a month contrary to Salaries and Remuneration Commission’s recommendation of a maximum of four (4) days sitting in a month;
  - b. an order directing the applicants to recover the said overpayments from the respondents; an order directing that the respondents were paid all their dues and nothing is pending with the applicants as their arrears;
  - c. any other relief that this honorable court may deem fit and just to grant; and costs of the suit.
4. The High Court found that the dispute between the applicants and the respondents was on payments of dues to the respondents and in the final analysis Nzioki, J. on 27<sup>th</sup> October 2022 entered judgment in favour of the respondents and held that the applicants were jointly and severally liable to the 2<sup>nd</sup> to 11<sup>th</sup> respondents as follows:



- a. Underpayment to 2<sup>nd</sup> to 11<sup>th</sup> respondents – Kshs.11,704,000/= each making a total of Kshs.117,040,000/=
  - b. Kshs.1,000/= to each respondent as a token award for the infringement of their constitutional rights – total of Kshs.10,000/=
  - c. Gratuity at the rate of 31% of the gross salary for the 22 months of service – to be calculated by the 1<sup>st</sup> applicant and paid within 30 days of the judgment in default of which interest will accrue on the sum for gratuity at commercial rates of interest from the date of filing suit till payment in full.
  - d. Costs of the suit.
  - e. Interest on the sums in a) and b) above at court rates from of judgment till payment in full.”
5. After the delivery of the said judgment, the respondents filed an application seeking review and correction of the computation of the judgment sums awarded to them. By a ruling dated 25<sup>th</sup> April 2023, Nzioki J. allowed the respondents’ review application and effected the corrections which are also contained in the amended decree dated 17<sup>th</sup> May 2023, as follows:
- a. Underpayment to 2<sup>nd</sup> to 11<sup>th</sup> respondents – Kshs.11,704,000/= each making a total of Kshs.128,744,000/=
  - b. Kshs.1,000/= to each respondent as a token award for the infringement of their constitutional rights – total of Kshs.11,000/=
  - c. Gratuity at the rate of 31% of the gross salary for the 22 months of service – to be calculated by the 1<sup>st</sup> applicant and paid in full within 30 days of the judgment in default of which interest will accrue on the sums for gratuity at commercial rates from the date of filing suit till payment in full.
  - d. Costs of the suit.
  - e. Interest on the sum in a) and b) above at court rates from date of judgment till payment in full.”
6. Aggrieved and dissatisfied with the entire judgment dated 27<sup>th</sup> October 2022, the applicants preferred an appeal to this Court by lodging their notice of appeal dated 22<sup>nd</sup> June 2023 and subsequently, filed the instant application.
7. The application is supported by the grounds set out on the face thereof and those advanced in the supporting affidavit sworn on 5<sup>th</sup> July 2023 by Wilson Njega; Principal Administrative Secretary-Internal Secretary and a Public officer in the 1<sup>st</sup> applicant’s ministry.
8. The respondents have not filed their response to the application.
9. We heard the application through this Court’s virtual platform on the 31<sup>st</sup> October 2023. Present for the hearing was learned counsel Mr. Museve for the respondents. There was no appearance for the applicants despite service with the hearing notice. Mr. Museve expressed his intention to entirely rely on the respondent’s replying affidavit sworn on 14<sup>th</sup> July 2023 by Salim Ndemo and written submissions dated 25<sup>th</sup> July 2023. Although Mr. Museve stated that the respondents had filed their replying affidavit in response to the instant application, we note that the same is not in the court record, as it could not be traced by the registry in the Court Tracking System (CTS) platform. We are



therefore constrained to conclude that there is no replying affidavit on record. However, we note that the respondents' written submissions are on record.

10. Although the applicants have filed their written submissions dated 18<sup>th</sup> July 2023, the same is erroneously headed "brief summary." The submissions are largely a reiteration of the grounds set out on the face of the application.
11. We have carefully considered the application, the written submissions by both parties, the authorities cited, and the applicable law. The principles for our consideration in the exercise of our unfettered discretion under rule 5 (2) (b) to grant an order of stay of execution or injunction and stay of proceedings is well settled. First, an applicant has to satisfy that he has an arguable appeal. However, an arguable appeal must not be one that will necessarily succeed. It is an appeal that is not frivolous or idle. Secondly, an applicant must demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These twin principles were summarized by this court in the case of *Stanley Kang'ethe vs. Tony Ketter & Others* [2013] eKLR.
12. In considering the twin principles set out above, both limbs must be demonstrated to this court's satisfaction.
13. Regarding arguability, the applicants contend that they have an arguable appeal with high prospects of success and that it is sufficient to demonstrate a single arguable point. Reliance for this proposition is sought in the case of *Kenya Hotel Properties Limited vs. Willisden Investments Limited & 6 Others* [2013] eKLR.
14. In rebuttal, the respondents in their written submissions argue that the applicants have not demonstrated that they have an arguable appeal. Secondly, the respondents submit that they are aware that the impugned decree cannot be executed in the normal manner through the execution process that applies to decrees against the government and other related bodies given that the same is against the government.
15. The respondents urge this Court to take cognizance of the age of all the respondents, who retired more than 10 years ago and are in their sunset years. That they have awaited the payment of their claim arising from impugned decree for long and that it is only fair and just that their decree be secured through deposit of the entire sum in a neutral bank in joint names of counsel pending the hearing and determination of the appeal.
16. Relying on the following cases of *County Government Secretary/Chief Executive Officer – Homabay County Government & Another vs. Lilian Purity Nyajowi & 6 Others* [2020] eKLR and of *Kenya Medical Laboratory Technicians & Technologists & 7 Others vs. Attorney General; Commission of University Education & Another (Interested Parties)* [2020] eKLR; the respondents urged that the application for stay orders is not well founded and is intended to deny the applicants the fruits of their judgment. They prayed for the dismissal of the application.
17. On nugatory aspect, the applicants argue that the 2<sup>nd</sup> to 11<sup>th</sup> respondents have filed a Judicial Review application in the High Court, to wit, HC JR Misc. Application No. E065 of 2023 seeking orders of mandamus to compel the Cabinet Secretary to comply with the judgment as in the fore stated ruling and judgment and are apprehensive that if the proceedings are not stayed, and the orders of mandamus issued, then their appeal will be rendered nugatory in the event it is successful.
18. The applicants argue that this matter is of immense public interest as the decretal sum is colossal and has greater financial implication on the applicants and the public Wage Bill at large, taking into account that the Government financial year had just started and the amount must be budgeted for.



Consequently, if execution of the judgment is not stayed the applicants shall stand to lose colossal sum of money especially if it is paid out to the respondents, following them to recover is not guaranteed.

19. Relying on the case of *Attorney General vs. Okiya Omtatah Okoiti & Another* [2019] eKLR the applicants submit that in the event that decretal sum is paid, the respondents will be erroneously awarded a huge sum of money.
20. Lastly, the applicants submit that the issue at hand is in the public interest therefore the orders of stay should be granted. The applicants relied on the Supreme Court case in *Gitirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others* [2014] eKLR where stay orders were granted in the public interest.
21. On the first limb, as to whether or not the appeal is arguable, we have to deliberate whether there is a single bona fide arguable ground that has been raised by the applicants worth of consideration by this Court in an appeal. We note that the applicants have already filed the main appeal to wit, Civil Appeal No. E527 of 2023. Looking at the grounds in support of the appeal, it is our view that the same are not idle. For instance, the applicants challenge the learned trial court's finding that the 2<sup>nd</sup> to 11<sup>th</sup> respondents are entitled to gratuity each at the rate of 31% for 22 months of service. That in default of payment within 30 days from date of judgment interests will accrue on the sum of gratuity at commercial rates of interest from the date of filing suit till payment in full. That all these notwithstanding the fact that gratuity was not pleaded.
22. We need not say much on arguability now, lest we embarrass the bench that will be seized of the main appeal. We are thus contented that the applicant has demonstrated this limb to our satisfaction.
23. On the second limb of nugatory aspect, we re-state what has been summarized in the Stanley case (*supra*) 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. In doing so, we must also consider the conflicting claims for all parties and each case has to be determined on its merit. See. *NIC Bank Limited & 2 Others vs. Mombasa Water Products Limited* [2021] eKLR.
24. We have carefully considered the arguments put forth by both the applicants and the respondents on this issue and going by the arguments made by the applicants, we are satisfied that they have demonstrated the second limb that their appeal shall be rendered nugatory if the orders of stay are not granted.
25. In addition, we note that this matter is of public interest, the decree of the impugned judgment is payment of a colossal sum of money, which, we note, is paid against public funds. We agree that the impugned judgment has great financial implication on the applicants. Consequently, if execution of the said judgment is not stayed, the applicants shall stand to lose a colossal sum of money. We are guided by *Gitirau* case (*Supra*) where the Supreme Court held as follows;

“ Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their establishment attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources.”



26. With the above said, we are satisfied that the applicants have satisfied the twin principles for grant of stay under rule 5(2) (b) of the Court’s *Rules*. Accordingly, the Notice of Motion application dated 5<sup>th</sup> July 2023 application is merited and is hereby allowed in the following terms:

- 1. Pending the hearing and determination of the Civil Appeal No E298 of 2023-
  - a. There shall be a stay of execution of the judgement and ruling delivered on 25<sup>th</sup> April 2022 and 27<sup>th</sup> October 2022 respectively in ELRC No. 84 of 2020;
  - b. There shall be a stay of proceedings in the High Court in HC JR Miscellaneous Application No. E065 of 2023.
- 2. The costs of this application shall abide the appeal. Dated and delivered in Nairobi this 9<sup>th</sup> day of February, 2024

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

