



REPUBLIC OF KENYA



**Teacher Service Commission & another v Mutisya (Civil Application
E091 of 2023) [2024] KECA 80 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 80 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E091 OF 2023
MA WARSAME, K M'INOTI & GWN MACHARIA, JJA
FEBRUARY 9, 2024**

BETWEEN

TEACHER SERVICE COMMISSION 1ST APPLICANT

KENNETH MARANGU 2ND APPLICANT

AND

ROSE MWENDE MUTISYA RESPONDENT

(Application for stay of execution pending the hearing and determination of an appeal from the judgment and decree of the Employment & Labour Relations Court at Nairobi (Ongaya, J.) dated 10th March 2023 in ELC. Pet. No. E159 of 2022)

RULING

1. The 1st applicant, Teachers Service Commission (TSC) and the 2nd applicant, Kenneth Marangu (Mr. Marangu) seek an order of stay of execution of the judgment and decree of the Employment and Labour Relations Court (ELRC) dated 10th March 2023 in which Onyago, J. issued declarations against the TSC and Mr. Marangu, quashed disciplinary proceedings undertaken by them against the respondent, Rose Mwende Mutisya (Ms. Mwende), and ordered the TSC to reinstate and deploy her within 30 days of the judgment.
2. The brief background to the application is that the TSC employed Ms. Mwende on 14th September 1990. At the time it terminated her employment on 17th May 2022, Ms. Mwende was serving as a senior human resource officer. Following discovery by TSC in 2021 that some 22 teachers had been irregularly promoted, leading to adjustment of salaries and overpayments without any supporting documentary evidence, TSC constituted a committee to investigate the irregularities and Ms. Mwende, together with eight others, were identified for disciplinary action. On 16th December 2021, TSC interdicted Ms. Mwende for breach of its human resource manual for secretariat staff and gave her 21 days to respond to the allegations against her.



3. On 29th December 2021 Ms. Mwendé responded to the allegations in writing. It is common ground that Ms. Mwendé admitted the irregular promotions which she attributed to errors and mistakes occasioned by a heavy workload and pressure of work. In taking responsibility for the irregularities, Ms. Mwendé stated:

“I highly regret the error and apologise for any embarrassment or loss it might have cost the Commission and commit to ensure that such errors do not occur again. I promise to be more keen in future.”

4. Soon thereafter, TSC appointed a disciplinary panel chaired by Mr. Marangu, a deputy director. Ms. Mwendé wrote to TSC requesting some documents for purposes of preparing for the hearing and TSC advised her that she could have the documents after making the payment required under the human resource manual. After hearing the matter, the disciplinary panel noted, among others, that Ms. Mwendé had admitted keying in the irregular cases; that prior to the discovery of the irregularities she had not raised with her supervisor the issue of workload and pressure of work; and that she had previously been served with a notice to show cause and cautioned for a similar irregularity in 2017. The disciplinary panel found the allegations against Ms. Mwendé proved and dismissed her from employment on 17th May 2022.
5. Ms. Mwendé then moved to the ELRC and filed a petition claiming that her termination was unlawful. She prayed for declarations that her termination was vitiated by the fact that the disciplinary panel was chaired by Mr. Marangu whilst the responsibility is exclusively vested in TSC and cannot be delegated;

that the disciplinary proceedings were accordingly null and void; that the failure by TSC to supply her with the documents she had requested was a violation of her right to information under Article 35(1) and the right to fair hearing under Article 50(5)(b) of *the Constitution*; an order of certiorari to quash the disciplinary proceedings; a mandatory order to compel TSC to reinstate her without loss of earnings, and a mandatory order for payment of general damages for losses and inconvenience.

6. TSC opposed the petition through a replying affidavit sworn by its director for human resource management and development, Dr. Julius Olayo. After hearing the petition, the learned judge held that the disciplinary panel was not properly constituted and that although TSC had passed a resolution that all categories of secretariat staff discipline cases, except for reviews, would be heard by the management, that resolution was invalid. The learned judge reasoned that because the TSC human resource policies and procedures manual for secretariat staff which required disciplinary meeting to be chaired by a Commissioner was made pursuant to the *Public Officer Ethics Act*, it was a statutory instrument within the meaning of the *Statutory Instruments Act* and therefore could not be amended by TSC without involving Parliament.
7. The learned judge also found that the dismissal of Ms. Mwendé only from among the others who were subjected to the disciplinary tribunal was discriminatory and excessive. As regards Ms. Mwendé’s admission of the irregularity, the court found that it did not justify dismissal. On her complaint about denial of access to information, the court found that she was to blame for failure to pay for the documents she wanted, as required by the policies. Ultimately, the court allowed the petition and made the orders we have already set out above.
8. Aggrieved by the judgment, TSC moved to this Court for an order of stay of execution. In the motion and written submissions, TSC and Mr. Marangu contend that the appeal, which they have already filed as Civil Appeal No. E288 of 2023 is arguable. The memorandum of appeal annexed to



- Ms. Mwende’s further affidavit sworn on 7th July 2023 contains 16 grounds of appeal, among them that the ELRC erred by misapprehending the legal nature of the TSC human resource policies and procedures manual; by mischaracterising the manual as a statutory instrument rather than an internal administrative tool for disciplinary procedures and processes; by holding that TSC cannot delegate the disciplinary function for its secretariat staff; by ordering TSC to reinstate Ms. Mwende when the employment relationship had irretrievably broken down; by holding that TSC discriminated against Ms. Mwende without any evidence; and by awarding special damages which were neither pleaded nor proved.
9. On whether the pending appeal risks being rendered nugatory, TSC and Mr. Marangu submitted that the judgment has precipitated a crisis as regards disciplinary proceedings against TSC’s secretariat staff and that it would not be possible to recover from Ms. Mwende the public funds that the ELRC directed to be paid to her. They further contended that the order of reinstatement was disruptive and incapable of being undone once implemented because Ms. Mwende had admitted the irregular promotion of teachers and TSC had lost confidence in her.
 10. Ms. Mwende opposed the application through a replying affidavit sworn on 23rd March 2023, a further affidavit sworn on 7th July 2023, submissions dated 25th March 2023 and further submissions dated 12th July 2023. The substance of her response is that the appeal is not arguable because the TSC manual is a statutory instrument within the meaning of the *Statutory Instruments Act* and required amendments thereto to be tabled in Parliament. It was also contended that the application had been overtaken by events because Ms. Mwende had reported back to work, though she had not been deployed. She cited *Kaushik Panchamatia & 3 Others v. Prime Bank Ltd & Another [2020]* eKLR in support of the proposition that relief will not issue in a matter that has been overtaken by events.
 11. In her further replying affidavit Ms Mwende impeaches the validity of the appeal filed by TSS and Mr. Marangu and asserts that it was served upon her out of time and as a result she has filed an application to strike it out.
 12. We have carefully considered the application, the judgment of the ELRC, the submissions by the parties and the authorities they cited. An applicant under rule 5(2)(b) of the Court of Appeal Rules will be entitled to any of the remedies under that rule once they have filed an appeal or a notice of appeal and satisfy the court that the intended appeal is arguable and will be rendered nugatory if it succeeds. (See *Trust Bank Ltd and another v. Investech Bank Ltd and 3 Others [2000]* eKLR). It has been stated time and again that an arguable appeal is not one that must succeed when it is heard, but merely an appeal that is not frivolous and raises even one bona fide ground of appeal that deserves consideration by the Court (See *Ahmed Musa Ismael v. Kumba Ole Ntamorua & 4 Others [2014]* eKLR).
 13. On the other hand, whether an appeal will be rendered nugatory depends on the circumstances of each case. (See *Reliance Bank Ltd Norlake Investments Ltd (2002) 1 EA 227*). As the court explained in *Ahmed Musa Ismael v. Kumba Ole Ntamorua & 4 Others*, supra, the purpose of this consideration is:

“to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succour by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual.”
 14. An appeal will be rendered nugatory if what is sought to be forestalled cannot be reversed or can only be reversed at great expense or cannot be adequately compensated with damages. (See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013]* eKLR). Lastly, the applicant is obliged to satisfy both considerations. It will not suffice to satisfy only one of the considerations. (See *Republic v. Kenya Anti-Corruption Commission & 2 Others [2009]* KLR 31).



15. Turning to the merits of this application, we start by pointing out that the issue of the competence of the appeal is not before us.
16. That is the subject of a different and separate application where the considerations are totally different. Secondly, to the extent that Ms. Mwendu admits she has not been deployed, there is no cogent evidence before us that this application has been overtaken by events.
17. Applying the tests we have set out above, we are satisfied that Civil Appeal No. 288 of 2023 is arguable. Grounds like whether delegation of powers by TSC to Mr. Marangu was valid; whether the TSC manual is a Statutory Instrument requiring to be tabled in Parliament before it is amended; whether ipso facto, differential treatment of employees constitutes unlawful discrimination; and whether in the circumstances of this case restatement and award of special damages merited are not idle issues.
18. On the second limb, TSC and Mr Marangu question the ability of Ms. Mwendu to refund moneys paid to her. They also point out to the confusion that the judgment has wrought in disciplinary proceedings against secretariat staff of the TSC to underscore that balance of convenience tilts in favour of allowing the application. We are also alive to the consequences that a successful appeal will suffer if reinstatement takes place pending appeal.
19. Taking all the above into account, we are satisfied that this is a deserving case for an order of stay of execution. We accordingly, allow the notice of motion dated 14th March 2023 and stay execution of the judgment of the ELRC dated 10th March 2023 until the hearing and determination of Civil Appeal No. E288 of 2023. Costs of this application will abide the outcome of the said appeal. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

