



**Kenya National Commission for Unesco & another v Cabinet Secretary
for Education & 2 others; Lentoijoni & 2 others (Interested Parties) (Civil
Application E044 of 2023) [2024] KECA 67 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KECA 67 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E044 OF 2023
P NYAMWEYA, FA OCHIENG & WK KORIR, JJA
FEBRUARY 2, 2024**

BETWEEN

KENYA NATIONAL COMMISSION FOR UNESCO 1ST APPLICANT

DR EVANGELINE NJOKA 2ND APPLICANT

AND

CABINET SECRETARY FOR EDUCATION 1ST RESPONDENT

MARTIN NJOROGE 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

ANTONINA LENTOIJONI INTERESTED PARTY

PATRICK OCHICH INTERESTED PARTY

PROF GRACE BUNYI INTERESTED PARTY

*(Being an application for stay of execution of the decision of Employment
and Labour Relations Court (ELRC) at Nakuru (H. Wasilwa, J.)
dated 21st February 2023 in ELRC Petition No. E015 of 2022)*

RULING

1. In the instant application, the Kenya National Commission for UNESCO (the 1st applicant) and Dr. Evangeline Njoka (the 2nd applicant) are before us with a notice of motion dated April 2023 through which they seek an order staying the execution of the judgment delivered on 21st February 2023 in Nakuru ELRC Petition No. E015 of 2022 pending the hearing and determination of their intended



- appeal. They also pray for the costs of the application. The application is based on the grounds on its face and reinforced by the supporting affidavit of the 2nd applicant.
2. The applicants' case is that although they filed an appeal on 21st February 2023 against the trial court's judgment, the respondents have commenced the process of execution of the said judgment by seeking the removal of the 2nd applicant from office. They aver that the execution of the judgment will adversely affect the operations of the 1st applicant, since the 2nd applicant is its Chief Executive Officer (CEO) and the Secretary of its Board and is therefore in charge of its day to day running. They also depose that the removal of the 2nd applicant from office before the expiry of her term will stall the activities of the Board of the 1st applicant and bring its affairs to a standstill; that there is a likelihood of the said judgment being misconstrued, rendering all the actions made by the 2nd applicant in her capacity as the CEO and Secretary to the Board unconstitutional and irregular hence creating chaos and uncertainty in the operations and affairs of the 1st applicant; and, that the impugned judgment also revoked the appointment of two Board members, thus reducing the members to less than the mandatory nine thus incapacitating the Board.
 3. The applicants further depose that crippling the operations of the 1st applicant is against public interest as the technical and research services it renders are indispensable to the public; that the execution of the judgment poses a danger to the right of the public to benefit from the activities and services of the 1st applicant; that the intended appeal is arguable and has high chances of success; and, that the execution of the judgment will halt the operations of the 1st applicant thereby subjecting the applicants to irreparable damages rendering the intended appeal nugatory.
 4. The application is opposed by the 1st respondent, Martin Njoroge, through an affidavit sworn on 6th October 2023. He avers that he challenged the appointment of the 2nd applicant as the CEO of the 1st applicant on the grounds that her appointment contravened constitutional values and principles of transparency, accountability, public participation, and competitiveness. He states that the 2nd applicant conceded as much in her own evidence before the trial court. The 1st respondent additionally avers that the term of the 2nd applicant as the CEO of the 1st applicant came to an end on 31st May 2022 and an execution of the judgment will not result into her forceful and premature removal from office as her term has ended anyway.
 5. In response to the averment that the activities of the Board will stall due to the removal of the 2nd applicant alongside two other Board members, the 1st respondent avers that pursuant to sections 6 and 15 as read with Paragraph 3 of the Second Schedule to the [*Kenya National Commission for UNESCO Act, 2013*](#), the 1st applicant's Board is quorate to undertake its functions, as the quorum of the Board is six members. The 1st respondent consequently prays for the dismissal of the application asserting that the intended appeal is not arguable and will not be rendered nugatory if the impugned judgment is not stayed.
 6. This application was before us for virtual hearing on 11th October 2023. Learned counsel Mr. Ojiambo who appeared for the applicants had filed submissions dated 8th August 2023. Learned counsel Mr. Kotonya appeared for the 1st respondent having filed submissions dated 6th October 2023. There was no appearance for the Cabinet Secretary for Education (2nd respondent) and the Attorney General (3rd respondent) despite service of the hearing notice.
 7. Learned counsel Ms Tuwei held brief for Mr. Kirimi for Prof. Grace Bunyi, Antonina Lentoijoni and Patrick Ochich, the 1st to 3rd interested parties. She informed the Court that the interested parties were not aligning themselves to any of the sides in the present application and would therefore not make any submissions.



8. Mr. Ojiambo and Mr. Kotonga opted to rely on their written submissions with brief oral highlights of the same. Mr. Ojiambo set off by appreciating that a party seeking stay before this Court must establish an arguable appeal and the likelihood of the appeal being rendered nugatory should stay not be granted. Counsel submitted that the intended appeal is arguable as it raises questions about the jurisdiction of the trial court and the validity of the appointment of the 2nd applicant. To buttress his submission on this issue, counsel relied on the case of *Stanley Kang'ethe Kinyanjui v. Tony Ketter & 5 others* [2013] eKLR.
9. Turning to the question as to whether the appeal will be rendered nugatory, Mr. Ojiambo submitted that the impugned judgment, if implemented, will render all the decisions and actions taken by the 2nd applicant null and void. According to counsel, such an eventuality will result in chaos and uncertainty in the operations and affairs of the 1st applicant. Counsel argued that were the operations of the 1st applicant to stall, then the intended appeal will be rendered nugatory, if it eventually succeeds. Counsel also urged that staying the implementation of the impugned judgment will validate the actions of the 2nd applicant pending the intended appeal. He relied on the case of *Reliance Bank Ltd v. Norlake Investment Ltd* [2002] 1 EA 227 to buttress his arguments.
10. Mr. Kotonya on his part argued that the 2nd applicant's term as the CEO of the 1st applicant came to an end on 31st May 2023 and she was succeeded by one Dr. James Njogu. Counsel therefore submitted that this application has been overtaken by events and is anchored on apprehensions that are legally and factually incorrect. According to counsel, the impugned judgment neither revoked the appointment of the 2nd applicant as the CEO of the 1st applicant nor did it invalidate her actions during her tenure.
11. Mr. Kotonya also submitted that the application has not met the conditions for grant of stay as established in *Trust Bank Ltd & Another v. Investech Bank Ltd & 3 others* [2000] eKLR. He stated that the 1st applicant's Board is still capable of discharging its mandate pursuant to the provisions of sections 6 and 15 as read with Paragraph 3 of the Second Schedule to the *Kenya National Commission for UNESCO Act, 2013*. Counsel submitted that as per the stated provisions, the quorum for the 1st applicant's Board is six members and that currently there are seven validly appointed members. Counsel further relied on the case of *Gitaru Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR to submit that it is not in the public interest that a stay order be issued in this case. Counsel consequently urge us to dismiss the application with costs.
12. We have carefully considered the motion, the grounds and the affidavit in support, the replying affidavit, the rival submissions by the parties and the law. This is an application for stay of execution pending appeal pursuant to Rule 5(2)(b) of the Court of Appeal Rules. It is not disputed that the applicants have lodged a notice of appeal in this matter and that being so, our jurisdiction has been properly invoked. In order to gain favour of the Court's discretionary jurisdiction to grant stay pending appeal, an applicant has to demonstrate that he has an arguable appeal which is not frivolous or an idle judicial expedition and that unless an order of stay is granted the intended appeal will be rendered nugatory. These principles were well expounded in *Stanley Kang'ethe Kinyanjui v. Tony Ketter & others* (*supra*).
13. Therefore, the first issue for our determination is whether the intended appeal is arguable. The applicants did not attach a draft memorandum of appeal to their application. However, from the application and the submissions, the applicants intend to impugn the judgment of the trial court, on among other grounds, the grounds that the trial court lacked jurisdiction to entertain the 1st respondent's case, and, that the trial court erred in holding that the 2nd applicant's appointment was unconstitutional and thus invalid. As stated in *Stanley Kang'ethe Kinyanjui v. Tony Ketter & others* (*supra*), it is sufficient if a single bonafide arguable ground of appeal is raised and that 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. Without saying more, lest we prejudice the bench that will eventually hear the intended appeal, we are satisfied that the issues raised by the applicants are arguable and deserve full ventilation through the intended appeal. The applicants have therefore cleared the first hurdle.

14. The next question is whether the applicants have demonstrated that the intended appeal will be rendered nugatory if the impugned judgment is not stayed. On this issue, the applicants aver that they are apprehensive that the implementation of the impugned judgment may be misconstrued to render null and void all the decisions and actions taken by the 2nd applicant. The applicants also contend that the removal of the 2nd applicant from office before the expiry of her term will stall the activities of the Board of the 1st applicant. Further, that the revocation of the appointment of two members to the 2nd applicant's Board in the impugned judgment has incapacitated the Board by reducing its membership to less than the mandatory nine. The 1st respondent countered these arguments by stating that the 2nd applicant's term came to an end on 31st May 2023 and she has since been replaced. Further that the 1st applicant's Board is still quorate.
15. In *Permanent Secretary Ministry of Roads & another v Fleur Investments Limited* [2014] eKLR, a picture of an appeal that has been rendered nugatory was painted thus:

“A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law.”

The question is whether in the circumstances of this case, the applicants' intended appeal will be rendered nugatory if the impugned judgment is not stayed. We note that during the hearing of this application, Mr. Ojiambo for the applicants acknowledged that indeed the 2nd applicant's term had come to an end. Counsel also acknowledged that the 2nd applicant's appointment was for a five-year non-renewable term. This being the case, the applicants' argument that they are apprehensive of the removal of the 2nd applicant from office prior to the end of her contractual term is without basis. You cannot remove someone from an office she no longer holds by virtue of the operation of the law. Indeed, granting an order of stay will amount to prolonging the term of the 2nd applicant in contravention of the applicable law. With regard to the validity of the 2nd applicant's actions, we note that the trial court, even after finding that the 2nd applicant's appointment was unconstitutional, saved her service until the end of her term. The orders of the trial court therefore had the effect of saving her actions even in the post-judgment period.

16. Another ground upon which the applicants premised their application is the assertion that the 1st applicant's operations will be brought to a halt as it will no longer have the nine members on its Board that allows it to conduct business. On this issue, we agree with Mr. Kotonya for the 1st respondent that 1st applicant's Board was at the time of the filing of the application compliant with the law. Section 6 of the *Kenya National Commission for UNESCO Act, 2013* lists the nine members that shall form the Board of the 2nd applicant. Section 15 provides that the business and affairs of the Board shall be conducted in accordance with the Second Schedule to the Act. Paragraph 3 of the Second Schedule provides that the quorum for the conduct of business at a meeting of the Board shall be two-thirds of all the members of the Board. It was not disputed by the applicants that at the time of the filing of the application the Board had 7 members and was therefore quorate. The contention that the removal of two Board members alongside the 2nd applicant would therefore stall the operations of the 1st applicant is thus unfounded.
17. Based on the foregoing, we find that the applicants have not proved the nugatory aspect of this application. In our view, there is no action that can be taken by the respondents that is likely render the



applicants' intended appeal nugatory. The impugned judgment saved the actions of the 2nd applicant, left the 1st applicant's Board quorate and the 2nd applicant's term has since come to an end and a new CEO is in office.

18. Finally, the applicants submitted that it was in the interest of the public that the orders for stay be issued. Having established that there is no basis for staying the judgment, we are of the view that no harm will be occasioned to the public by not granting stay orders.

19. We therefore find that this application lacks merit and is for dismissal. It is therefore dismissed. There being a pending appeal, the costs of this application shall abide the outcome of the main appeal.

DATED AND DELIVERED AT NAKURU THIS 2ND DAY OF FEBRUARY 2024

P. NYAMWEYA

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

