



**Kenya Medical Research Institute & another v Mwangi (Civil Application 046 of 2022) [2024] KECA 343 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] KECA 343 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 046 OF 2022  
HM OKWENGU, MA WARSAME & JM MATIVO, JJA  
MARCH 15, 2024**

**BETWEEN**

**KENYA MEDICAL RESEARCH INSTITUTE ..... 1<sup>ST</sup> APPLICANT**

**BOARD OF MANAGEMENT ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JAMES MARINGA MWANGI ..... RESPONDENT**

*(Being an application for stay of execution of the Judgment of the Employment and Labour Relations Court at Nairobi (Nduma Nderi, J.) delivered on 28th October, 2021 in ELRC Petition No. 81 of 2020)*

**RULING**

1. The applicants have filed a notice of motion dated 11th November 2022, under Rule 5(2)(b) seeking stay of execution of the Judgment of the ELRC (Nduma Nderi J.) pending the hearing and determination of their appeal.
2. In a nutshell, the respondent who was an employee of the applicant, sued the applicants in the Employment and Labour Relations Court after he was dismissed from service vide a letter dated 31st July 2020 following the issuance of show cause letters to answer to two allegations of absenteeism without authority and insubordination, and disciplinary proceedings wherein he was found guilty on both counts by the Human Resource Management and Advisory Committee of the applicants.
3. The impugned judgement which was delivered in favour of the respondent held *inter alia*, that: the disciplinary process conducted against the respondent and his termination were unlawful, an order of Certiorari be brought to the Court to quash the decision of the applicants contained in the letter of termination dated 31st January, 2020 and the respondent be reinstated to his position as head of internal audit KEMRI (the 1st Applicant) with immediate effect with all his back salary, allowances, benefits accrued by virtue of his employment and position.



4. The application is premised on the grounds that the applicants have an arguable appeal with good chances of success and that if this Court refuses to grant the stay order, the applicants will suffer substantial loss and irreparable damage thus rendering the intended appeal nugatory. It is contended that the appeal raises arguable issues as detailed in their memorandum of appeal which raises thirteen grounds of appeal including that the respondent intentionally failed to disclose material facts to the trial court, that he had gained employment prior to the hearing of the suit with another state corporation namely Numerical Machining Complex Limited, under the Ministry of Industry as the manager internal audit, whereas the order of reinstatement with full back salary and benefits if implemented would entitle the respondent to dual remuneration from separate state corporation in violation of public policy, policy guidelines by the Salaries and Remuneration Commission and the Salaries and Remuneration Commission Act 2011. It was further contended that the respondent's claim was filed as a petition for violation of the constitution yet the court ignored the threshold to be met in Petitions on alleged violation of rights under the Constitution and determined the matter as though it was an ordinary employment suit before the ELRC.
5. On the nugatory Limb it was alleged that the payment of back salaries as ordered, to a civil servant for a period when the respondent was still working in a separate corporation may render the appeal nugatory as public funds will be lost without a way of recovery. Secondly, the order for reinstatement was draconian under the circumstances of the present case noting the potential disruption of the management of the 1st applicant which cannot be redeemed or compensated given that the respondent's relationship with his supervisors had broken down completely.
6. The application was opposed *vide* a replying affidavit sworn by the respondent herein who deposed inter alia that the application is an abuse of the court process in that the applicants had filed a similar application before the High Court which was dismissed for failure to meet the requisite threshold and for failing to comply with the judgement; that the respondent's current employment is immaterial as he has indicated his readiness to resume his duties immediately but the same has been ignored and that the grounds of appeal have no basis especially when faulting the judge over material that was not presented at trial.
7. When the matter came up before us, Mr. Opole, the learned counsel for the applicants emphasised that the relationship between the parties was sour and had irreparably broken down and could not be salvaged and that a person had already been competitively recruited for the position hence reinstatement was not an option as it would render the appeal nugatory.
8. He explained that the respondent was automatically reinstated and that the respondent reported to work on 23rd January 2023 following the direction of the trial judge as the principal internal auditor but he was insisting on the position of deputy director internal audit. He confirmed that the back pay had not been effected and pointed out that the respondent was already in gainful employment in another public institution and there was no evidence that the respondent had resigned from the other state corporation. Lastly he emphasised that back pay up to the point of termination from February 2020, would result in double salary from state organisations and a loss of public funds.
10. Mr. Waloba, the learned counsel for the respondent, submitted that the applicants had brazenly admitted to defying the judgement of the court by not paying the respondent as directed by the court and in any event should not be rewarded with the orders sought. It was contended that there was no evidence before the court that the respondent's position had been filled and the respondent should be reinstated. It was further submitted that the mechanisms for reclaiming double salaries were well known in law and that the procedure can be activated once the sums are paid if the respondent is in breach.



11. We have considered the application, the submissions and the authorities cited. Counsel are most certainly alive to the requirement that to succeed in such an application, the applicant is required to demonstrate that the intended appeal is arguable and that if we do not accede to the request to grant the orders sought the intended appeal will be rendered nugatory. See *Reliance Bank Ltd. (in liquidation) v Norlake Investments Ltd.* [2002] 1 EA 227.
12. We have examined the filed memorandum of appeal. The applicants complain inter alia about the learned Judge's finding that the disciplinary process did not meet the threshold under Section 41 of the *Employment Act, 2007* as due process was not followed in compliance with the Act and the applicable Human Resource and Procedure Manual. They further contend that the learned Judge erred in law by failing to hold that that the respondent had failed to exhaust the internal remedy provided under Section 74 of the *Public Service Commission Act* and that the learned Judge erred in law and exceeded his jurisdiction in ordering the respondent's reinstatement whereas at the time of making the order the respondent was gainfully employed elsewhere by Numerical Machining Complex Limited as a Manager - Internal Audit. The principles are plain that the applicants needed to demonstrate a single bona fide arguable ground and that ground need not be one which will necessarily succeed when the appeal is eventually considered. In our view, whether there was evidence that the disciplinary process was conducted in bad faith or in accordance with the provisions of the *employment Act* and the Human Resource Manual are not frivolous issues and the applicant has surmounted the first hurdle.
13. As to whether the appeal will be rendered nugatory, should the impugned judgement and decree not be stayed, we note that factors which can render an appeal nugatory are to be considered within the circumstances of each particular case and in doing so, the court is bound to consider the conflicting claims of both sides. The applicant is of the view that the appeal would be rendered nugatory because it has allegedly employed someone else to take up the position after the termination of the respondent's employment and to reinstate him would only serve to cause more hardship to it because the relationship between the parties is in shambles. In addition, the applicant states that if the order of stay is refused, it will have to pay the respondent salary arrears, and should the intended appeal be successful, there is no guarantee that the respondent would be able to pay back the money.
10. The respondent on his part is of the view that the appeal would not be rendered nugatory as the orders for reinstatement should be self- executory and is emphatic that he is desirous of continuing with his position as deputy director internal audit. We note that factors which can render an appeal nugatory are to be considered within the circumstances of each particular case and in doing so, the court is bound to consider the hardships likely to be faced by both sides. In addition, the inability of the other side to refund the decretal sum is not the only thing that would render the success of the appeal nugatory. (See *Reliance Bank Limited v Norlake Investments Limited* [2002] 1 EA 227)
11. It is common ground that the respondent was forced to seek employment elsewhere after his termination and that he is more than willing to resume his duties. However, should the appeal be successful, the respondent would have the compounded hardship of having to leave his position again and seek alternative employment.

Similarly, if the orders sought are not granted the applicants will be placed in a precarious position of not having a stable deputy director of internal audit which is no doubt a core department in their organisation. It is however not lost on us that the applicants have not complied with the back pay orders of the court. In the circumstance, we are of the view that conditional relief would best serve the interests of justice noting that the appeal has already been filed and is pending hearing.



10. Accordingly, the application is allowed. There shall be stay of execution of the decree on condition that the applicants deposit the decretal sum in a joint interest earning account in the names of advocates for the parties within 30 days of this ruling. Costs shall abide by the outcome of the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

