



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Revenue Authority v Ayoo (Civil Application
E363 of 2021) [2024] KECA 429 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 429 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E363 OF 2021
AK MURGOR, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA
APRIL 26, 2024**

BETWEEN

KENYA REVENUE AUTHORITY APPLICANT

AND

NELSON O. AYOO RESPONDENT

*(Being an application for stay of execution against the Judgment of
the Employment and Labour Relations Court at Nairobi (Mbaru, J.)
delivered on 27th September 2021 in Nairobi ELRC Cause No. 283 of 2019)*

RULING

1. This appeal arises out of a suit in the Employment and Labour Relations Court where the respondent, Nelson O. Ayoo, filed a claim against the applicant, the Kenya Revenue Authority, for wrongful suspension and subsequent dismissal from employment. Upon hearing the parties, the learned Judge held that the respondent's employment was unfairly terminated, and the applicant was ordered to pay 10 months compensation to the respondent.
2. The applicant was aggrieved and intends to appeal against that decision. In the meantime, it has brought this Notice of Motion dated 21st October 2021 premised on rules 5(2) (b), 41, 42 and 47 of the *Court of Appeal Rules* seeking orders that this Court stays execution of the trial court order of 27th September 2021 pending hearing and final determination of this application and the applicant's intended appeal. The motion was supported by the affidavit of Grace Mwangi, the applicant's Employment Relations Unit Human Resources Manager, sworn on the same day, and written submissions where it was contended that the respondent was an employee of the applicant until 3rd October 2013; that he was suspended following internal investigations into the illegal export of ivory to Hong Kong, through Kilindini Port where he was found to have gated in the questionable container using entry number 2012MSA3613557, which bore no relationship with entries in the Simba System,



and instead showed that had been used to load soft drinks destined from Mombasa to South Sudan; and that, thereafter, the respondent was invited to defend himself at a disciplinary committee hearing after which a decision was made to terminate his employment. He was dissatisfied with the decision and filed a claim against the applicant. It was contended that, after finding that he was unlawfully terminated, the applicant was ordered to pay the respondent 10 months compensation; that, in so ordering, the applicant averred that the learned Judge failed to take into account the applicant's response, and documentary evidence that demonstrated that the respondent had breached the terms of his employment contract, which is what led to the suspension and termination of his employment; that the trial court also failed to take into account that lengthy investigations were instituted against the respondent for facilitating the fraudulent exportation of ivory, which is prohibited.

3. It was further deponed that the applicant's appeal is arguable because the learned Judge did not appreciate that section 41 (1) of the *Employment Act* provides that an employee may be accompanied by a fellow employee or a union representative to the disciplinary proceedings, and that the respondent did not prove that during the disciplinary hearing he was denied such representation; that the applicant has lodged an appeal which has a high chance of success; and that it would be rendered nugatory were the respondent to be paid the 10 month's compensation because, if such payment were made, he would not be in a position to refund it.
4. The applicant prayed that stay of execution be granted to preserve the substratum of the intended appeal.
5. By an affidavit in reply sworn by the respondent, and in written submissions, the respondent averred that the applicant does not have an arguable appeal; that he was wrongfully suspended on 3rd October 2023 up to 29th June 2018, a period of almost 5 years, which was contrary to the stipulated suspension period of 6 months; that the Disciplinary Committee hearing of 24th November 2015 was flawed and unprocedural, and contrary to the provisions of the Kenya Revenue Authority Employee Code of Conduct; that he was not provided with the minutes of the meeting or any other documents surrounding the allegations made against him; that he was not informed that he was entitled to representation during the disciplinary proceedings; and that, in the event that this Court grants the orders of stay sought, the applicant should deposit the amount of 10 months compensation into a joint interest bearing account in the names of the parties' counsel.
6. During the hearing on a virtual platform, learned counsel Ms. Chepkwonyi appeared for the applicant. There was no appearance for the respondent despite having been duly served with the hearing notice.
7. In so far as applications filed under rule 5(2) (b) of this *Court's Rules* are concerned, the threshold requirement to be satisfied are amplified in the case of *Republic vs. Kenya Anticorruption Commission and 2 others* [2009] eKLR thus:

“The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, the appeal or intended appeal is not frivolous, that is to say, that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds their results or success could be rendered nugatory”.

8. Turning to the first limb as to whether the intended appeal is arguable, we have considered the application, the affidavits in support and in reply, and the counsel's submissions. As discerned from the motion, one of the applicant's complaint is that the learned Judge did not take into account the applicant's documentary and other evidence adduced during the hearing; that, by so doing, the Judge reached the wrong conclusion. What the applicant seems to be saying is that the trial court



failed to properly evaluate the evidence as required by law which, as a consequence, lead to the wrong conclusion. If indeed this were the case, we consider this ground to be arguable.

9. On the second limb as to whether the appeal would be rendered nugatory in the event that it was to succeed, the applicant contends that if the decreed compensation of 10 months were to be paid to the respondent, he would not be in any position to refund the amount. On the other hand, the respondent has not stated whether or not he can refund the amount paid, but he nevertheless has suggested that the amount paid be deposited into a joint interest earning account in the names of counsel. Considering that there is the likelihood that the respondent will not be in a position to refund the compensation amount were it to be paid and the appeal succeeds, we are satisfied that the appeal would be rendered nugatory.
10. Accordingly, the applicant having satisfied the twin requirements specified under rule 5(2) (b) of this Court's Rules, the motion dated 21st October 2021 has merit and is hereby allowed. Costs in the appeal.
11. This Ruling has been signed and delivered under Rule 34(4) of the Court of Appeal Rules, Mbogholi Msagha, JA. (as he then was) having since retired from judicial service.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

Dr. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

