



Maasai Mara University Council & another v Walingo & 3 others (Civil Application E086 of 2023) [2024] KECA 503 (KLR) (26 April 2024) (Ruling)

Neutral citation: [2024] KECA 503 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E086 OF 2023
F TUIYOT'T, FA OCHIENG & WK KORIR, JJA
APRIL 26, 2024**

BETWEEN

MAASAI MARA UNIVERSITY COUNCIL 1ST APPLICANT

MAASAI MARA UNIVERSITY 2ND APPLICANT

AND

PROF MARY KHAKONI WALINGO 1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION 2ND RESPONDENT

MINISTRY OF EDUCATION 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

(An application for stay of execution pending the hearing and determination of an intended appeal against the Ruling and Order of the Employment and Labour Relations Court at Nakuru (H. Wasilwa, J.) dated and delivered on 28th September, 2023 in ELRC Petition No. E007 of 2022)

RULING

1. Before us is a notice of motion dated 6th October 2023 brought under sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#) and rules 5(2)(b) and 43 of the Court of Appeal Rules, 2022. Through the application, the 1st applicant (Maasai Mara University Council) and the 2nd applicant (Maasai Mara University) seek to stay the execution of the ruling and/or order dated 28th September 2023 emanating from Nakuru Employment and Labour Relations Court (E&LRC) in Petition No. E007 of 2022 pending the hearing of the intended appeal. The application is premised on the grounds on the face as well as the averments of Dr. Kennedy Ole Kerei in his affidavits of 6th October 2023 and 14th December 2023.



2. The applicants' case is that on 28th September 2023 Hellen Wasilwa, J of the E&LRC allowed an application by the 1st respondent, Prof. Mary Khakoni Walingo, while dismissing the applicants' notice of preliminary objection. The impugned ruling was to the effect that the applicants were to pay the 1st respondent a decretal sum of KSh. 81, 019, 348. The applicants contend that the learned Judge erred in awarding the 1st respondent the decretal amount yet the amount was fictitious as it was not proved. They also contend that the impugned award is humongous and the same if paid, shall incapacitate the operations of the 2nd applicant. The applicants also argue that if the said sum is paid to the 1st respondent, the intended appeal may be rendered nugatory.
3. Dr. Kennedy Ole Kerei in his affidavit in support of the application averred that the applicants are apprehensive that if the orders sought are not granted, the 1st respondent will execute the impugned ruling thus rendering the intended appeal nugatory. He also averred that the 2nd applicant has been hit by a financial crunch since the COVID-19 pandemic due to low student enrolment, hence the applicants will suffer difficulties in complying with the impugned judgment.
4. The 1st respondent opposed the application through her affidavit sworn on 17th October 2023. She averred that the decretal sum was deserved as she served the applicants as the Vice- Chancellor. According to her, the applicants' appeal is not arguable and is frivolous, vexatious and lacks merit. She terms the application as a mere delaying tactic meant to derail her enjoyment of the fruits of judgment. She averred that the award in the ruling emanated from the decision of the 3rd respondent, the Public Service Commission, which decision the applicants have declined to comply with. She also avers that the sum awarded by the learned Judge was pleaded and supported by her affidavit. She deposed that there is no appeal against the judgment of the 3rd respondent, hence the intended appeal is frivolous and will not be rendered nugatory. In her supplementary affidavit sworn on 21st February 2024, the 1st respondent averred that she is capable of refunding the decretal sum in the unlikely event that the intended appeal succeeds and that it is the applicants who are suffering from a cash crunch. In support of this averment, she deposed that she has savings as well as two properties namely land parcels numbers RUIRU/RUIRU EAST BLOCK 2/9063 and KAKAMEGA/KEDOLI/878 which could sufficiently compensate the decretal sum should the applicants' appeal succeed. She consequently urged us to balance her interest against that of the applicants and dismiss the application with costs.
5. When this application came up for hearing through the virtual platform on 26th February 2024, there was no appearance for the applicants as well as the 2nd respondent (Ministry of Education), 3rd respondent (Public Service Commission) and 4th respondent (the Attorney General). Mr. Manwa was present for the 1st respondent. However, the applicants had filed submissions dated 14th December 2023 while the 1st respondent had also filed written submissions dated 17th October 2023.
6. The submissions for the applicants were filed by the firm of Mirugi Kariuki. Through those submissions, counsel submitted that the application had met the threshold for granting the orders of stay as the intended appeal raises a plethora of arguable issues. Counsel argued that the decretal amount was humongous and the 1st respondent would not be able to reimburse the same were the appeal to succeed. Counsel submitted that complying with the impugned ruling has the potential of bringing the 2nd applicant to its knees. It was also counsel's submission that the interests of justice tilts in favour of granting the orders of stay as the parties will be granted an opportunity to be heard in the appeal without the risk of the appeal being rendered nugatory. Counsel urged us to find merit in the application and allow it with an order that the costs be in cause.
7. In opposition to the application, Mr. Manwa for the 1st respondent referred to the decision in Kenya Hotel Properties Limited v. Attorney General & 5 others [2020] eKLR to submit that an application,



such as the instant one, which is frivolous, not arguable, made of straw and built on quick sand is for dismissal. Counsel argued that the points raised in the instant appeal are frivolous and the applicants' singular aim is to avoid complying with the trial Court's orders and that cannot be a basis for holding that the intended appeal is arguable. Relying on the definition of the term "nugatory" as worthless, futile, invalid and trifling in *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others* [2013] eKLR, counsel submitted that the applicants have not demonstrated that failure to stay the impugned decision will render their appeal nugatory. In response to the applicants' assertion that the award to the 1st respondent was fictitious, counsel submitted that the applicants acknowledged that they owed his client salary arrears and that the tabulations were derived from her employment contract. In urging for the dismissal of the application with costs to the 1st respondent, counsel submitted that the applicants have not demonstrated that they have an arguable appeal whose success will be rendered nugatory if stay is declined.

8. We have carefully considered the motion, the supporting affidavits, the replying affidavits, the rival submissions of the parties and the law. This is a rule 5(2)(b) application. The exercise of our jurisdiction under the stated rule is discretionary. In order for an applicant to carry the day, it must first be demonstrated that there is an arguable appeal but this does not mean that the appeal must eventually succeed. Secondly, an applicant must also demonstrate that unless the order of stay is granted the intended appeal stands the risk of being rendered nugatory. These principles have been expounded in a long list of the decisions of this Court including the cases of *Attorney General v. Eunice Makori & another* [2020] eKLR and *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others* (supra).
9. Therefore, the first issue for our determination is whether the applicants have an arguable appeal. At this stage, we are not enjoined to pronounce ourselves conclusively on the applicants' intended appeal. All that is required of an applicant to do is to demonstrate that the grounds of appeal deserve to be argued fully before the Court. That the applicant only needs to establish that the appeal is arguable and that the Court need not to make final conclusions on the applicants' intended appeal was expressed in *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others* (supra) thus:
 - “vii) 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. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
 - viii) In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. *Damji Pragji* (supra).”
10. In reviewing the grounds upon which the motion is brought, we find that the intended appeal is arguable as it questions the jurisdiction of the E&LRC, questions the propriety of the dismissal of the applicants' preliminary objection and challenges the manner in which the trial Court arrived at the decretal amount. In our view, even if the stated grounds of appeal may not succeed in the long run, they raise arguable points deserving of a hearing by this Court. The applicants have therefore surmounted the first hurdle.
11. The second principle an applicant must satisfy is to demonstrate that in the absence of stay orders, the intended appeal will be rendered nugatory. The purpose of an order of stay pending appeal is to preserve the subject matter of the intended appeal hence the need for an applicant to establish that if the order is not granted then the appeal will be rendered nugatory. In *Stanley Kangethe Kinyanjui v.*



Tony Ketter & 5 others (supra) the Court addressed the question as to what a nugatory appeal is and when it can be said that an appeal is likely to be rendered nugatory. In that regard, the Court stated that:

- “ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page
- x. 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.
- xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”

12. In this case, the decretal sum is KSh. 81, 019, 348. The applicants averred that the amount is substantial and if execution is allowed to proceed, the 2nd applicant stands the risk of its operations grinding to a halt. The applicants also averred that they have been facing a cash crunch since there has been poor student enrolment since the COVID-19 pandemic. Further, that the 1st respondent may not be in a position to refund the decretal amount should their intended appeal succeed. The 1st respondent on the other hand asserts that she is a person of means having been a career lecturer and a renowned nutritionist. In her affidavit of means, she talked of savings and two parcels of land. The applicants did not respond to the affidavit of means dated 21st February 2024. However, the 1st respondent has also disclosed that she retired on 24th September 2023.
13. The term nugatory must be given full meaning within the circumstances of a particular case. Ordinarily, an appeal will not be rendered nugatory simply because the decretal amount if paid may not be recoverable. However, where there exists any other information or circumstances that may render an appeal nugatory other than payment of the decretal sum, the Court will not hesitate to consider such other factors cumulatively in assessing whether the appeal will be rendered nugatory. This position resonates with the holding of the Court in *Kenya Shell Limited v. Benjamin Karuga Kibiru & Another* [1986] eKLR

that:

“As I said I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause...

But this court must look at the matter from the point of view of rule 5(2) of Court of Appeal Rules, and here the test would be whether the appeal would be rendered nugatory, unless payment of the decretal sum were stayed. It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory. It is loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory.”

(Emphasis ours)



14. In this case, the Court is called upon to balance between the competing rights of the parties. While we agree with the applicants that the decretal sum of KSh. 81, 019, 348 is colossal on the face of it, the 1st respondent filed an affidavit of means deposing that she will be in a position to refund the decretal sum if the pending appeal is successful. However, as we have already mentioned the 1st respondent has since retired from service hence her ability to repay the decretal amount could have diminished. The 1st respondent has also not attached any proof as to what she has saved and savings which may be used in recovery of the decretal sum should the applicants succeed in their appeal. Similarly, despite the 1st respondent attaching title deeds of her two properties, there is no valuation report to aid in the assessment as to whether the realization of the same would adequately compensate for the decretal sum. Further, the procedure of disposal of the two properties might also pose a hurdle to the applicants in the realization of the decretal sum if the appeal were to succeed.
15. The foregoing notwithstanding, as was stated in *Kenya Shell Limited v. Benjamin Karuga Kibiru & Another* (supra), we are bound to consider whether the applicants have laid any other information that may render the appeal nugatory. In this case, the 2nd applicant is a Government entity funded through the exchequer and by extension the taxpayer. There is a danger that allowing execution to go on may put public funds beyond the reach of the applicants. Considering the foregoing factors, we find merit in the applicants' averment that the intended appeal may be rendered nugatory because the 1st respondent may not be in a position to reimburse the decretal amount. The decretal sum is a substantial amount which the 1st respondent, having retired, and with no proof of savings and with properties of unknown value, may find difficulty in reimbursing if the appeal were to succeed. Additionally, if the 2nd applicant were to be compelled to pay the decretal sum, their operations may grind to a halt. The ensuing consequences would be detrimental and an award of damages would not sufficiently restore the 2nd applicant to its current position.
16. In the circumstances, the applicants have demonstrated that they have an arguable appeal and that the appeal will be rendered nugatory if execution is not stayed. They have thus satisfied the twin principles for grant of stay.
17. Accordingly, the application dated 6th October 2023 is allowed, on the terms that the execution of the ruling delivered on 28th September 2023 in Nakuru ELRC Petition No. E007 of 2022 is hereby stayed pending the hearing and determination of the applicant's intended appeal. Costs shall abide the outcome of the intended appeal.
18. Orders accordingly.

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

F. TUIYOTT

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL



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

Signed

DEPUTY REGISTRAR

