



County Government of Bomet & 2 others v Chebet & 2 others (Civil Application E022 of 2024) [2024] KECA 541 (KLR) (17 May 2024) (Ruling)

Neutral citation: [2024] KECA 541 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E022 OF 2024
MA WARSAME, PO KIAGE & FA OCHIENG, JJA
MAY 17, 2024**

BETWEEN

**COUNTY GOVERNMENT OF BOMET 1ST APPLICANT
COUNTY SECRETARY – BOMET COUNTY 2ND APPLICANT
COUNTY EXECUTIVE MEMBER FOR ADMINISTRATION PUBLIC SERVICE
& SPECIAL PROGRAMS 3RD APPLICANT**

AND

**MARGARET CHEBET 1ST RESPONDENT
COUNTY PUBLIC SERVICE BOARD - BOMET 2ND RESPONDENT
COUNTY ASSEMBLY - BOMET COUNTY 3RD RESPONDENT**

(An application for stay of execution of the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Kericho (D. Nderitu, J.) delivered on 1st February 2024 in ELRC Petition No. E008 of 2022)

RULING

1. Before us is an application for a stay of execution of the judgment delivered on 1st February 2024. The applicants also seek orders for the stay of the proceedings in Petition No. E008 of 2022, which is pending before the Employment and Labour Relations Court.
2. In the judgment, the trial Judge quashed the 1st applicant’s notice, through which the 1st respondent’s employment was terminated.
3. The court declared that the 1st respondent was an employee of the 1st applicant on permanent and pensionable terms.



4. Furthermore, the 1st applicant was restrained by an order of a permanent injunction, from acting on the termination notice or any other notice unless and until such a notice was in strict compliance with the law.
5. Being dissatisfied with the judgment, the applicants herein filed a Notice of Appeal dated 5th February 2024.
6. Whilst, awaiting the hearing and determination of their intended appeal, the applicants sought orders for a stay of execution, on the grounds that unless the orders are granted, the applicants stand to suffer substantial loss.
7. It was the applicants' position that their intended appeal is arguable. In support of this contention, the applicants provided the court with a draft memorandum of appeal.
8. In answer to the application, the 1st respondent submitted that the applicants failed to demonstrate that they have an arguable appeal. It is her view, that the applicants had simply cast a wide and imprecise net, which failed to give rise to any arguable appeal.
9. As far as the 1st respondent was concerned, the assertion that the trial Judge disregarded the evidence, did not amount to an arguable appeal.
10. On the second limb, the 1st respondent pointed out that the trial court had already held that her employment was on permanent and pensionable terms. Therefore, if the court stayed the execution of the judgment, the 1st respondent deems that to be a violation of her constitutional rights.
11. Accordingly, the 1st respondent invited this Court to hold that the application for stay was; “untenable as what the applicants seek to be stayed has already been done”.
12. It is well settled that an application for a stay of execution, pursuant to Rule 5(2)(b) of the [Court of Appeal Rules](#) is determinable by answering the twin questions as was addressed in the case of [Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others](#) [2013] eKLR by this Court as follows:
 - “i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 Others v Nderitu & another* (1989) KLR 459.
 - ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
 - iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
 - iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
 - v. An applicant must satisfy the court on both of the twin principles.
 - vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.



- 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).
 - 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 232.
 - 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.”
13. We have given due consideration to the application, the submissions, and the applicable law. In our considered view, the intended appeal raises at least one arguable issue, namely;
- (a) Whether or not the learned Judge erred by declaring that the 1st respondent was an employee on permanent and pensionable terms, whilst the contract of her employment stated otherwise.
14. In the case of [*Dennis Mogambi Mang'are v Attorney General & 3 others*](#) [2012] eKLR, this Court held that:
- “An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”
15. On the second limb, we note that the 1st respondent did not controvert the applicants’ concerns, about her inability to refund the public funds if she was paid by the applicants now, and then the intended appeal was to fail.
16. It is trite that the burden of proving the capability of refunding the award money lay with the 1st respondent. In the case of [*International Laboratory for Research on Animal Diseases v Kinyua*](#), 1990] KLR 403, the court held that:
- “In this application it has been deponed that there was a reasonable and justifiable apprehension of it being unlikely to recover the money from the respondent who may have squandered the whole sum. This allegation in our view called for rebuttal evidence from the respondent which was not forthcoming. Indeed nowhere in the 12 paragraphs constituting the replying affidavit sworn by Mr Sehmi on 17th April, 1990, and the replying affidavit sworn by him on 7th February, 1990, in the Superior Court which forms an annexure is there evidence of the respondent’s means. Mr Sampson’s affidavit in support of the application has in fact been deposed to that effect. In the case of Kenya Shell Ltd



the respondent produced evidence of his financial means and position which evidence was accepted by the court.”

17. Similarly, in *Britam General Insurance Company Kenya Limited v Abigail Khasoa Simiyu* [2020] eKLR, this court ruled that:

“As to whether the intended appeal will be rendered nugatory if successful unless we grant the orders sought, the judgment amount is substantial. The applicant asserted that it does not know “the respondent’s means of reimbursing the substantial decretal sum in the highly likely event of the intended appeal succeeding.” As the Court stated in *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403 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. In that regard, beyond stating the applicant has substantial means and that by its standard the amount involved is paltry, the respondent does not claim or demonstrate that she has the ability to reimburse the decretal amount in the event of the appeal succeeding, should we decline to stay the judgment in the meanwhile.”

18. In the case of *Reliance Bank Ltd v Norlake Investments Ltd* [2002] I EA 227, this Court held that the 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. In the circumstances of that particular case, the Court stated *inter alia*:

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”

19. Accordingly, we find that the applicants have satisfied the two requirements for the grant of an order for a stay of execution. We so grant.
20. We are also satisfied that the continuation of proceedings before the trial court whilst, the intended appeal is still pending may result in the issuance of orders that could be prejudicial to the applicants.
21. Accordingly, having come to the conclusion, that the execution be stayed, it is also in the interests of justice that further proceedings before the trial court be and are hereby stayed. Costs to abide the appeal.

DATED AND DELIVERED AT NAKURU THIS 17TH DAY OF MAY, 2024.

M. WARSAME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL



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

Signed

DEPUTY REGISTRAR

