



**Odhiambo & 3 others v County Government of Nairobi City County & 114 others
(Civil Application E118 of 2024) [2024] KECA 662 (KLR) (14 June 2024) (Ruling)**

Neutral citation: [2024] KECA 662 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E118 OF 2024
S OLE KANTAI, P NYAMWEYA & JM MATIVO, JJA
JUNE 14, 2024**

BETWEEN

**DR. BRIAN ODHIAMBO 1ST APPLICANT
DR. EILEEN ADHIAMBO 2ND APPLICANT
DR. EDISON OKOTH 3RD APPLICANT
DR. CHERYL TIKOLO 4TH APPLICANT**

AND

**COUNTY GOVERNMENT OF NAIROBI CITY COUNTY 1ST RESPONDENT
COUNTY PUBLIC SERVICE BOARD, NAIROBI 2ND RESPONDENT
PUBLIC SERVICE COMMISSION 3RD RESPONDENT
KENYA MEDICAL PRACTITIONERS, PHARMACISTS & DENTISTS UNION
& 111 OTHERS & 111 OTHERS & 111 OTHERS & 111 OTHERS & 111
OTHERS & 111 OTHERS & 111 OTHERS 4TH RESPONDENT**

*(An application for Stay of Execution of the Judgment / Order of the
Employment & Labour Relation Court of Kenya at Milimani (B.
Manani J.) dated 29th February 2024 in ELRCC No. E904 of 2024)*

RULING

1. The Applicants herein, Dr. Brian Odhiambo, Dr. Eileen Adhiambo, Dr. Edison Okoth and Dr. Cheryl Tikolo filed an application by way of a Notice of Motion dated 12th March 2024, seeking orders that this Court grants a temporary order of stay of the judgment issued on 29th February 2024 by the Employment and Labour Relations Court, pending the hearing and determination of their intended appeal against the said judgment. These



prayers are supported by an affidavit sworn on even date by Faith M'edea Mutua, an advocate of the High Court of Kenya. After the filing of the application a preliminary objection dated 19th March 2024 was filed by the 1st and 2nd Respondents as follows:

1. That the application dated 12th March, 2024 is fatally and incurably defective, hopeless, frivolous, mischievous and an abuse of the court process.
 2. That the Notice of Motion dated 12th March, 2024 and the Supporting Affidavit dated 12th March, 2024 are incurably defective as the Commissioner for Oaths who purportedly commissioned the Supporting Affidavit to the Notice of Motions is the same advocate who has signed the Certificate of Urgency dated 12th March, 2024, which goes against section 4 of the Oaths and Statutory Declaration Act, Cap 15 Laws of Kenya
 3. That the Notice of Motion dated 12th March 2024 and the Supporting Affidavit therein are incurably defective as they are commissioned by the law firm on record for the Applicants, contrary to section 4 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya.
 4. That in contravention with Rule 9 of the Advocates (Practice) Rules, the Advocate on record for the Applicants has sworn a Supporting Affidavit on behalf of the Applicants, which affidavit raises contentious matters.
 5. That the Applicants failed to observe due process by failing to seek leave of the court to participate in the suit before the trial court (ELRC E904 of 2023), the Application dated 12th March 2024 and the intended appeal before this court.
 6. That the 5th to the 111th Respondents have not been clearly identified and named, this makes it difficult to effect service and is a mechanism to frustrate proceedings.
 7. That the Applicants have not demonstrated an arguable appeal.
 8. That the appeal is incompetent and as such it should be dismissed in limine;
 9. As a consequence thereof, the entire application is bad in law and should be dismissed and struck out with costs to the Applicants.
1. The 1st and 2nd Respondents also filed a replying affidavit of the same date, sworn on 19th March 2024 by Nyagara Nyamwaya, the 2nd Respondent's Board Secretary and CEO, which we shall come back to later in this ruling. A number of responses to the preliminary objection were thereupon filed, namely, the 1st Applicant's Response to the Preliminary Objection dated 26th March 2024 filed by the 1st Applicant's Advocates on record, and a Replying affidavit sworn on 26th March 2024 by the 2nd Applicant. We heard the application on the Court's virtual platform on 23rd April 2024. Learned counsel Ms. Faith Mutua appeared for the Applicants, learned counsel Ms. Praxed Ngereso and Mr. Dennis Odeng' appeared for the 1st and 2nd Respondents, and learned counsel Ms. Wangechi Gichangi, appeared for the 3rd Respondent.



2. Ms Mutua and Ms. Ngereso highlighted their respective written submissions dated 26th March 2024 and 3rd April 2024, and Ms Ngereso also sought to have the 1st and 2nd Respondents' Preliminary Objection subsumed in the application. Ms. Gichangi informed the Court the 3rd Respondent had not filed any pleadings and was supporting the 1st and 2nd Respondents' submissions. During the hearing it became apparent that the Preliminary Objection was raising contested issues of fact, with the Applicant's counsel insisting that the advocate who commissioned its supporting affidavit was from a different law firm, and the counsel for the 1st and 2nd Respondents who had invited the Court to "take judicial notice" of the fact that the

records at the Registrar of Companies show that Ms. Faith Mutua and Ms. Christabel Mideva are both proprietors of Mutua Eboso & Company Advocates, conceded that they did not avail any of the said records to support their averments.

4. It is also notable that some of the grounds raised in the Preliminary Objection touch on the competence of the appeal, and can only be addressed in an application to strike out the Notice of Appeal. In particular, the 1st and 2nd respondents in this regard urged that the Notice of Appeal had not been effectively lodged as it had not been endorsed by the Deputy Registrar of the Employment and Labour Relations Court. In the end, the counsel for the 1st and 2nd Respondents was at pains to demonstrate the merits of the Preliminary Objection, and we deem it to have been abandoned.
5. We shall therefore only highlight the relevant facts and arguments that are salient to the application for stay of execution of the impugned judgment. The Applicants in this regard averred that they have been employees of the County Government of Nairobi City County since 2022, and had been previously recruited by the Public Service Commission on diverse dates between March and July 2021 on a fixed term contract of three years, to serve as employees of the Nairobi Metropolitan Services which was formed to manage the County Government functions on behalf of the National Government. On 30th September 2022 an agreement was entered between the two levels of government in which the National Government handed all the previously transferred functions back to the County Government, and it was the Applicants' position that the County Public Service Board absorbed them into its staff establishment pursuant to clause 3.3 (b) of the agreement and began paying them salaries and managing their employment affairs including deployment and supervision. However, that the County Public Service Board failed to prepare the written instruments to clearly outline the terms of their new engagement which the Applicants believed were to be permanent and pensionable.
6. Consequently, the trade union that represents doctors filed a suit seeking to compel the County Government of Nairobi to issue permanent and pensionable contracts to the Applicants, who were named in the suit along with other employees as interested parties. Various averments were made as regards the conduct of the suit and the attendance of the Applicants therein, but of relevance to this application is that the ELRC in its judgment found that the fixed term contracts of service signed between the Applicants and the Public Service Commission were still in force even after transfer back of functions to the County Government, and were the reference point as regards their ongoing employment status. The Applicants urged that the effect of this finding was that the said contracts of service, having been fixed term contracts of service of three years, would be terminating on diverse dates between March and July 2024; the Applicants' employment positions would fall vacant; and that the 2nd Respondent having already begun the process of recruitment to fill the positions. The Applicants averred that if the 2nd Respondent completes the process of recruitment, they would suffer



irreversible loss and there will be no status quo to maintain. The Applicants annexed copies of the impugned judgment, the agreement dated 30th September 2022, their contracts of service and their draft memorandum of appeal.

7. The 1st and 2nd Respondents opposed the application. The specific averments contained in their replying affidavit in this regard were that the trial Court in its judgment did not order any party to do anything, refrain from doing anything or pay anything, and was a negative order incapable of execution save with respect to costs. Additionally, the contracts signed by the Applicants were for a fixed term of three years from diverse dates from March to July 2021 and they were lapsing on diverse dates between March and July 2024. Therefore, that the Applicants have not demonstrated that the intended appeal will be rendered nugatory if this Court declines to grant the orders sought in the application. Further, that the Applicants seek to rely on the Framework of Handover of Transferred Functions from the National Government to the County Government signed on 30th September 2022 which did not form part of the evidence produced by either party before the trial Court, and thus cannot be relied upon by the Appellate Court. In any event that Article 3.6 of the said Framework provided that the individuals employed by the now defunct Nairobi Metropolitan Services would be retained subject to their contract terms.
8. The 1st and 2nd Respondent further averred that there were no instruments enacted to facilitate employment of the Applicants by the 3rd Respondent; the 1st and 2nd Respondents were to absorb the recruits, including the Applicants, subject to their terms of the contract; the contracts begin lapsing on diverse dated between March and July 2024; the Interested Parties had been shortlisted in the proposed recruitment process; and the Applicants were seeking to compel the 1st and 2nd Respondents to commit an illegality by unprocedurally absorbing and converting the Applicants' employment terms to permanent and pensionable without an open and fair recruitment process.
9. The 4th -115th Respondents did not file any pleadings in support or opposition of the application.
10. The applicable principles in the exercise of this Court's discretion under Rule 5 (2) (b) of the [Court of Appeal Rules, 2022](#) to grant an order for stay are well settled. Firstly, an applicant has to satisfy that he or she has an arguable appeal. Secondly and concurrently, the Applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal will be rendered nugatory. These principles have been restated and amplified by this Court in [Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others \[2013\] eKLR](#).
11. On arguability, Ms. Mutua in her submissions urged that the Applicants had raised question of law that were arguable, namely whether a Court may lawfully disregard the submissions of a party in the proceedings, whether an employment Court was bound by the doctrine of constitutional avoidance when dealing with purely employment questions, and the failure to consider and misapplication of a document that was primary in determining the status of employment of the Applicants. Ms. Ngereso on the other hand submitted that the Applicants seek to appeal the decision of the trial Court based on argument that they had an expectation of their employment terms being permanent and pensionable, the genesis of the expectation being a circular issued by the 3rd Respondent in 2021. It was their submission that the Applicants were originally employed on 3-year contract by the 3rd Respondent and later absorbed by the 1st and 2nd Respondents subject to the terms of their contracts with the 3rd Respondent, an issue which was extensively and intensively dealt with in the trial Court in its judgment, and also in Nairobi ELRCC E972 of 2023 - [Kenya National Union of Nutritionist and Dieticians vs Nairobi City County Government and 2 Others](#). The intended Memorandum of Appeal therefore did not raise any arguable issues to be determined by this Court.



12. Ms. Gichangi added while making oral submissions, that the contract between the 3rd Respondent and the Applicants was terminated, and the circular relied on to allege that the Applicants were converted to permanent and pensionable employees was not applicable.
13. We need to point out at the outset that an arguable appeal is not one which must necessarily succeed, but one which is not frivolous and merits to be argued fully. Further, that is sufficient if the Appeal raises only one triable issue. The Applicants have raised seven (7) grounds of Appeal in their draft Memorandum of Appeal that challenge the findings of the trial Judge on the nature of, parties to, and terms of the Applicants' contract of service, and the legal effect of the various instruments and agreements entered between the Public Service Commission, the Nairobi Metropolitan Services and the Nairobi City County Government on the Applicants' employment is therefore in issue. We are satisfied that the said grounds and issue merit consideration and are not frivolous. The test of arguability has therefore been met by the Applicants.
14. On the nugatory test, Ms Mutua's submissions were that the Court has to consider the conflicting claims of both parties and each case has to be considered on its merit and placed reliance on the decisions of this Court in the cases of *Raphael Kakene Muloki & Another vs Cabinet Secretary of Lands and 2 Others* [2021] eKLR and Raymond M. Omboga vs Austin Pyan Maranga Kisii HCCA No. 15 of 2020 that a negative order is one where nothing will be lost, and in which the Applicants stays in the same situation he was in before the suit. The Applicants submitted that the impugned judgment made the finding that the contract of service of the Applicants are fixed terms and if the judgment is not stayed and status quo maintained, the Applicants will be replaced when the said contracts expire and will lose their existing permanent and pensionable terms of employment, their careers and livelihoods will be disrupted, and they will not be able to claim unfair or unlawful termination under the *Employment Act*.
15. On the other hand, there will be no material injury or loss suffered by the Respondents because the effect of the stay will be that the doctors in question will continue providing health services under the permanent and pensionable arrangement, pending determination of the appeal, obviating the need to have their replacements just yet. Lastly, counsel also submitted that public interest leans towards granting, the application since the Respondents are public officers and entities and any fresh recruitment process to replace the Applicants will involve expenditure of public resources which will not be recoverable if the appeal was to succeed.
16. Ms. Ngereso on her part submitted that the Trial Court's judgment was a negative order, as it did not order any party to do anything or to refrain from doing anything, and a stay order cannot therefore lie. Reliance was placed on the decisions to this effect in *Registered Trustees, Kenya Railways Staff Retirements Benefits Scheme vs Milimo, Muthomi & Co Advocates* [2022] eKLR and *Jennifer Akinyi Osodo vs Boniface Okumu Osodo & 3 others* [2021] eKLR. Furthermore, that the Applicants had not demonstrated any significant loss that they may suffer by not being granted orders sought as there were remedies available should the appeal be successful, and the Applicants are estopped from pleading public interest as they had been shortlisted in the ongoing recruitment process in an effort to absorb them into the 1st and 2nd Respondents' employment upon expiry of their respective contracts. Reliance was placed on the case of *Nderi Wathuko Chongo & Another vs Samuel Njoroge Wathuko & Another* [2021] eKLR.
17. It was held in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others* (supra) that whether or not an appeal will be rendered nugatory depends on whether or not what is ought to be stayed or injuncted, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. We also refer to the observations made in *Reliance Bank Limited vs Norlake Investment Limited* (2002) 1 EA 227 that the factors which render an appeal nugatory are to be



considered within the conflicting claims of both sides. The Applicants have stated that they will lose employment and suffer irreversible loss if the 2nd Respondent proceeds and completes the already began process of recruitment of persons to replace them.

18. We are however not persuaded that the appeal will be rendered nugatory if stay is not granted, for three reasons. Firstly, as submitted by the 1st and 2nd Respondents, the impugned judgment by the trial Court is a negative order dismissing the suit therein, that is not capable of being stayed. Secondly, the Applicants' contracts of service were entered into on diverse dates between March and July 2021 for a fixed term of three years, and some have now expired, while others are nearing expiry. Lastly, we are of the view that damages are an adequate remedy in the event the Applicants' intended appeal succeeds. It is also notable that the Applicants do not dispute that they were shortlisted in the ongoing recruitment process being undertaken by the 1st and 2nd Respondents.

19. We accordingly find that the Applicants have not met the required threshold for the exercise of our discretion to order a stay, and the Notice of Motion application dated 12th March 2024 is hereby dismissed. Given the

various pleadings filed in relation to the application, each party shall bear its own costs of the Notice of Motion application dated 12th March 2024 and of the Notice of Preliminary Objection dated 19th March 2024.

20. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE, 2024

S. OLE KANTAI

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JUDGE OF APPEAL

P. NYAMWEYA

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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

