



**Principal Secretary, Ministry of Education, Department of Vocational & Technical Training  
& another v Kenya Union of Post Primary education Teachers (KUPPET) & 2 others  
(Civil Application E248 of 2022) [2024] KECA 683 (KLR) (14 June 2024) (Ruling)**

Neutral citation: [2024] KECA 683 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E248 OF 2022  
MA WARSAME, K M'INOTI & JM MATIVO, JJA  
JUNE 14, 2024**

**BETWEEN**

**PRINCIPAL SECRETARY, MINISTRY OF EDUCATION, DEPARTMENT OF  
VOCATIONAL & TECHNICAL TRAINING ..... 1<sup>ST</sup> APPLICANT  
ATTORNEY GENERAL ..... 2<sup>ND</sup> APPLICANT**

**AND**

**KENYA UNION OF POST PRIMARY EDUCATION TEACHERS  
(KUPPET) ..... 1<sup>ST</sup> RESPONDENT  
KEPHER LANGI OGUWI ..... 2<sup>ND</sup> RESPONDENT  
TEACHERS SERVICE COMMISSION (TSC) ..... 3<sup>RD</sup> RESPONDENT**

*(Application for stay of execution pending the hearing and determination of an appeal from the judgment and decree of the Employment & Labour Relations Court at Nairobi (Onyango, J.) dated 10th December 2021 in ELCC No. 521 of 2019)*

**RULING**

1. The two applicants in this application seek an order of stay of execution pending appeal from the judgment and decree of the Employment and Labour Relations Court (ELRC) at Nairobi (Onyango, J.) dated 10<sup>th</sup> December 2021. By the impugned judgment, the ELRC set aside a consent order entered into on 15<sup>th</sup> July 2019 by parties to two petitions that were consolidated, namely Kenya Union of Post Primary Education Teachers (KUPPET) v. Teachers Service Commission (TSC) & 3 Others, ELRC Petition No. 85 of 2018 and Rose Nyambura Chege & 4 Others v Teachers Service Commission & 4 Others, ELRC Petition No. 97 of 2018.



2. The parties to the consolidated petitions were the two applicants in this application, KUPPET, TSC, and five petitioners, who for reasons not clear from the record, were not made parties to the petition which resulted in the setting aside of the consent order. The 1<sup>st</sup> respondent, Kepher Lange Oguwi, who petitioned the ELRC to set aside the said consent order was not a party to the consolidated petitions. Indeed, the record shows that his application to be joined in the consolidated petitions was found to be without merit and dismissed. It is also apt to point out that on 9<sup>th</sup> November 2021 (before the impugned judgment), the ELRC (Rika, J.) dismissed an application by the five petitioners to set aside the same consent order after finding that no fraud or collusion was alleged and that the court was functus officio.
3. The consolidated petitions were provoked by the enactment by Parliament of the Technical and Vocational Training Act, No. 29 of 2013 (the Act). Prior to the enactment of the said Act, all trainers in technical and vocational institutions were employed by the TSC and were qualified for membership in KUPPET. The Act transferred technical and vocational training from TSC to the Department of Vocation and Technical Training in the Ministry of Education, Science and Technology. The Public Service Commission duly approved the transfer with effect from 1<sup>st</sup> July 2018 and thereafter, on 27<sup>th</sup> July 2018, the TSC issued Circular No. 17/2018 transferring 3,780 trainers to the Ministry of Education, Science and Technology under the Public Service Commission.
4. KUPPET and five lecturers filed two petitions in the ELRC, which were subsequently consolidated, challenging the transfers. By a judgment dated 1<sup>st</sup> March 2019, the ELRC (Abuodha, J.) held that under the Act, the Technical and Vocational Training Authority did not have power to employ trainers and accordingly quashed Circular No. 17/2018. The applicants in the present application were aggrieved and lodged a notice of appeal. They subsequently obtained an order of stay of execution of Abuodha, J.'s judgment. Following consultations between the applicants, KUPPET and TSC, the parties agreed on amendments to the Act and pending the amendments, they further agreed that to safeguard the employment status of the trainers, they would continue under the Ministry of Education, Department of Vocational and Technical training.
5. On 15<sup>th</sup> July 2019 the petitioners in the two consolidated petitions, the TSC and the Attorney General filed a consent order whose effect was to continue in force the order of stay of execution pending amendments to the Act. The parties further agreed on other interim measures regarding a recognition agreement, recovery and remittance of union dues, harmonisation of scheme of service for trainers; and periodic reports to the court on progress of amendments to the Act.
6. On 9<sup>th</sup> August 2019, the 1<sup>st</sup> respondent applied to set aside the consent order. By the judgment that the applicants intend to challenge on appeal, the ELRC set aside the consent order holding that the consent order went beyond the judgment of Abuodha J. and violated the 1<sup>st</sup> respondent's freedom of association and right to fair labour practice. The trial court further directed the applicants to refund moneys deducted from the salaries of the 1<sup>st</sup> respondent and others trainers in similar situation. The applicants were aggrieved and after lodging a notice of appeal on 17<sup>th</sup> December 2021, filed the application now before us for stay of execution.
7. In the affidavit sworn on 12<sup>th</sup> July 2022 by Elicanah Musiori in support of the application and written submissions dated 21<sup>st</sup> July 2022 and 2<sup>nd</sup> March 2023, the applicants contend that they have an arguable appeal because the ELRC erred by setting aside the entire consent order whilst what was in dispute was only deduction and remittance of union dues or agency fees to KUPPET; by failing to hold that the 1<sup>st</sup> respondent's petition was res judicata and that the court was functus officio; by ordering the applicants to refund moneys which ought to have been refunded by KUPPET; by ignoring that the court had already declined to join the 1<sup>st</sup> respondent to the petitions in which the consent order was recorded;



- by setting aside the consent order at the instance of a stranger to it; and by ignoring the applicants' written submissions.
8. On whether the appeal risked being rendered nugatory if it succeeded, the applicants submitted that the effect of the judgment of ELRC are irreversible and cannot be adequately compensated by award of damages. They added that they are required to refund a huge amount of Kshs 58, 319, 613.30 which ought to be refunded by KUPPET. Further, it was contended that the judgment of the ELRC has created great uncertainty as regards the employment status of all trainers in technical training institutions in the country and has also created anxiety and adversely affected the smooth running of programs in technical institutions. The applicants further submitted that it was in the public interest to grant the order of stay of execution. In support of their case the applicants relied on the rulings in Alfred Mincha Ndubi v. Standard Ltd [2020] eKLR, Julius Wahinya Kang'ethe & Another v. Muhia Muchiri Ng'ang'a [2017] eKLR, Stanley Kang'ethe Kinyanjui v. Tony Ketter & 5 Others [2015] eKLR and Gaterau Peter Munya v. Dickson Mwenda Kithinji & 2 Others [2014] eKLR.
  9. The 1<sup>st</sup> respondent did not file any replying affidavit or submissions. When he appeared online in person during the hearing of the application, the 1<sup>st</sup> respondent made brief oral submissions and urged that the applicants' intended appeal was not arguable because the consent order was in violation of Article 41 of *the Constitution*. He added that the consent order was properly set aside due to lack of enabling legal provisions in the Act for employment of trainers and that no deductions could be made from an employee's salary without consent.
  10. KUPPET opposed the application vide a replying affidavit sworn on 12<sup>th</sup> October 2022 by its Secretary General, Akelo M. T. Misori and submissions dated 3<sup>rd</sup> March 2023. It was contended that there was no valid notice of appeal because the one on record was not endorsed by the registrar, was not filed in court and had not been served on the respondents. For that reason, it was submitted on the authority of Safaricom Ltd v. Ocean View Beach Hotel Ltd & 2 Others [2010] eKLR, this Court did not have jurisdiction to entertain the application for stay of execution. It was also contended that the applicants did not serve a copy of the letter bespeaking proceedings upon KUPPET.
  11. As regards the nugatory criterion, it was submitted that the intended appeal did not risk being rendered nugatory because there was no valid appeal in the first place. It was also contended that there was inordinate delay in making the application for stay of execution.
  12. The 3<sup>rd</sup> respondent did not file any replying affidavit or submissions. However, when its learned counsel, Mr. Anyour appeared on line, he informed the Court that he was supporting the application for stay of execution.
  13. We have considered the impugned judgment, the application, submissions by the parties and the authorities they cited. We do not think, at this stage and in an application for stay of execution, we can validly entertain the issues raised by the KUPPET on the validity of the notice of appeal that is on record. Those issues are germane to an application to strike out a notice or record of appeal.
  14. Turning to the merits of the application, all the parties agree on the applicable principles in an application for stay of execution: the applicants must satisfy the Court that they have an arguable appeal and that unless the order of stay of execution is granted, the appeal will be rendered nugatory if it succeeds. (See Stanley Kangethe Kinyanjui v. Tony Ketter & Others [2013] eKLR). The applicant is obliged to satisfy both principles and will not be entitled to the order of stay by satisfying only one of them. (See Republic v. Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31).
  15. We further bear in mind that an arguable appeal is not one which must necessarily succeed. It is simply one that is not frivolous or one that raises even a single bona fide arguable point that deserves to be



considered and determined by the Court. (See Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, Civil Application No. Nai. 72 of 2001 and Ahmed Musa Ismael v. Kumba Ole Ntamorua & 4 Others [2014] eKLR).

16. Upon reflection, we are satisfied that the applicants' intended appeal is not frivolous. Among the issues that the applicants intend to pursue on appeal is whether the ELRC erred by setting aside the consent order at the instance of a non-party, whether the 1<sup>st</sup> respondent's petition was res judicata and whether the entire consent order was vitiated. Those, in our view are not idle issues. As of now, we are not required to say more lest we stray into a domain that is not ours (see Central Bank of Kenya Deposit Protection Fund Board v. Uhuru Highway Development Ltd & Others, CA No. 95 of 1999).
17. As to whether the intended appeal risks being rendered nugatory, the concern of the Court is to ensure that a successful appeal does not end up as a mere pyrrhic victory or a paper judgment (see Hashmuklal Virchand Shah & 2 Others v. Investment & Mortgage Bank Ltd [2014] eKLR). The Court will grant an order of stay of execution where what is apprehended cannot be undone or cannot be undone without undue hardship or expense, or cannot be adequately compensated by award of damages (see Stanley Kangethe Kinyanjui v. Tony Ketter & Others (supra). The Court also takes into account the respective hardship that an order of stay of execution is likely to wrought on the parties (see Nation Media Group & 2 Others vs John Joseph Kamotho & 3 Others, Civil Application No. 108 of 2006).
18. Taking all the above into account, we bear in mind the confusion that training in technical and vocational institutions in Kenya has been plunged into; the uncertainty about recovery of the moneys that the applicants have been directed to refund, and the fact that the ELRC had itself found it necessary to stay its judgment quashing the TSC Circular. All these considerations convince us that the applicants have demonstrated that the intended appeal risks being rendered nugatory in the absence of an order of stay.
19. Accordingly, the applicants having satisfied both principles, we direct that there shall be a stay of execution of the judgment and decree of the ELRC dated 10<sup>th</sup> December 2021 until the hearing and determination of the applicants' intended appeal. Costs of this application shall abide the outcome of the appeal. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF JUNE 2024.**

**M. WARSAME**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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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**

