



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

National Cohesion & Integration Commission & 6 others v Mbugua (Civil Application E095 of 2023) [2024] KECA 654 (KLR) (7 June 2024) (Ruling)

Neutral citation: [2024] KECA 654 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E095 OF 2023
F SICHALE, FA OCHIENG & WK KORIR, JJA
JUNE 7, 2024

BETWEEN

NATIONAL COHESION & INTEGRATION COMMISSION 1ST APPLICANT
REV. DR. SAMUEL KOBIA 2ND APPLICANT
WAMBUI NYUTU 3RD APPLICANT
ABDULAZIZ ALI FARAH 4TH APPLICANT
DR. DANVAS MAKORI 5TH APPLICANT
SAM KONA 6TH APPLICANT
DORCAS KEDOGO 7TH APPLICANT

AND

DR. SKITTER WANGECI MBUGUA RESPONDENT

(Being an Application for Stay of Execution of the Ruling & Orders of the Employment and Labour Relations Court at Nakuru (Wasilwa J), dated 5th October 2023 in Nakuru ELRC JR APPL NO. E003 of 2023)

RULING

1. By the motion on notice dated 31st October 2023, brought pursuant to the provisions of Article 50 (2) (q) of the [Constitution](#), Sections 3A and 3B of the [Appellate Jurisdiction Act](#), Section 5 of the [Judicature Act](#), Rule 81. 29 of the [\[Supreme Court of England and Wales\] Civil Procedure Rules 1998](#), Rule 5 (2)(b) of the [Court of Appeal Rules 2022](#) and all other enabling provisions of the law), National Cohesion and Integration Commission, Rev Dr. Samuel Kobia, Wambui Nyutu, Abdulaziz Ali Farah, Dr Danvas Makori, Sam Kona and Dorcas Kedogo (the applicants herein) have sought the following orders;



- a. Spent.
 - b. Spent.
 - b. Sent.
 - b. The implementation/execution of the impugned Ruling is stayed pending the filing, service, hearing and determination of the applicants intended appeal.
 - c. The planned sentencing of the applicants by the Superior Court is stayed pending the filing, service, hearing and determination of the intended appeal.
 - d. The costs of this application shall abide in the outcome of the intended appeal.
 - e. Such other, further, incidental or alternative orders as this Honourable Court may deem just and expedient.
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Rev Dr. Samuel Kobia, the 2nd applicant and the Chairperson of the 1st applicant (hereinafter “the Commission”), who deposed inter alia that on or around 6th November 2020, Commission appointed the respondent as its Secretary and CEO on a 3-year contract.
 3. That, on or around 10th November 2022, the Commission issued a show cause letter to the respondent as a result of various forms of misconduct by the respondent, pursuant to which the respondent instituted judicial review proceedings on 20th February 2023, challenging the issuance of the aforesaid show cause letter and the Superior Court issued an interlocutory order barring the Commission from taking any further disciplinary action against the respondent, pending the hearing of her judicial review application.
 4. That, on or around March 2023 and upon the Commission perusing the respondent’s judicial review application and the documents in support thereof, it was inter alia discovered that the respondent had fraudulently altered her appointment letter by increasing her term of employment from 3 years to 5 years contrary to among others the Mwangaza Code that governs the appointments of public sector CEOs.
 5. That upon deliberation, the Commission deemed the alteration of the appointment letter to be a separate and distinct misconduct from the misconduct that triggered the issuance of the show cause letter and subsequently suspended the respondent from office to pave way for investigations into the newly discovered misconduct.
 6. On or around 11th April 2023, the respondent instituted contempt of court proceedings against the applicants claiming that the suspension letter violated the interlocutory orders issued on 20th February 2023.
 7. On 5th October 2023, the Superior Court delivered a Ruling finding the applicants guilty of contempt of court for deliberately disobeying the interlocutory order issued on 20th February 2023 and scheduled their sentencing on 26th October 2023.
 8. That in view of the foregoing, the applicants face imminent risk of imprisonment and other penal consequences on account of the impugned ruling and that they intend to file an appeal to this Honourable Court against the impugned ruling.
 9. He further deposed that the intended appeal was arguable and that the same would be rendered nugatory unless the Court intervenes forthwith.



10. The motion was opposed vide a replying affidavit sworn by the respondent on 16th November 2023, who deposed inter alia that the applicants intended appeal as expressed in the Memorandum of Appeal was not arguable for reasons inter alia that the trial court's conclusion that the applicants were guilty of contempt was unimpeachable and that they had not demonstrated that the letter of 5th April 2023, was not an act of further disciplinary action against her and that further the scope of the orders given on 20th February 2023, stopped any disciplinary action against her pending the determination of the judicial review application.
11. She further deposed that the applicants had not shown that the intended appeal would be rendered nugatory if stay orders were not issued as the applicants had not been sentenced by the Superior Court and the anticipated sentence had not been enforced and that further the Superior Court had jurisdiction to hear and determine an application for stay of enforcement of the sentence, which it will ultimately pass upon the applicants.
12. When the matter came up for plenary hearing on 6th December 2023, Mr. Muthomi Thiankolu, Ms. Judy Mbugua and Mr. Njoroge learned counsel appeared for the applicants whereas Mr. Ezra Makori appeared for the respondent. Both parties relied on their written submissions dated 24th November 2023 and 4th December 2023 respectively, which they briefly highlighted orally in Court.
13. It was submitted for the applicants that their intended appeal raised bonafide issues namely; whether the learned judge erred in law and fact in failing to appreciate that the dispute's scope before her was limited to the matters set forth in the show cause letter dated 10th November 2022, excluding the respondent's future misconduct or subsequently discovered misconduct and failing to appreciate that the interlocutory orders did not confer any impunity or immunity to the respondent in respect to future misconduct and failing to appreciate that the scope of the interlocutory order was limited to matters set forth in the show cause letter.
14. On the nugatory aspect, it was submitted that the applicants faced imminent risk of imprisonment and other penal consequences which was irreversible. It was further submitted that purging the contempt was not a precondition for the grant of a relief under Rule 5 (2) (b), as it would make nonsensical the absolute right granted under Article 25 (c) of the Constitution. For this proposition, reliance was placed on the case of AB & Another v RB (2016) eKLR.
15. It was further submitted that the respondent had not demonstrated the manner in which failure to purge the contempt had impeached the course of justice or made it difficult for the trial court or this Court to ascertain the truth.
16. Ultimately therefore, we were urged to allow the application as prayed.
17. On the other hand, it was submitted for the respondent that the applicants appeal was not arguable for reasons set out in paragraph 48 of the replying affidavit of the respondent and that further, the applicants had knowledge of the court orders of 20th February 2023, but did not comply and that as such, the basic prerequisites for a finding of contempt were met.
18. It was further submitted that even after a finding of contempt, the applicants continued to defy the court order of 20th February 2023 by further suspending the respondent and ultimately terminating her employment and it was disingenuous for the applicants to seek protection of this Court yet they had blatantly disregarded the Superior Court orders.
19. On the nugatory aspect, it was submitted that the appeal would not be rendered nugatory as the court was yet to commit or sentence the applicants and that whereas it was true that the respondent had requested the trial court to commit them to civil jail, the court was not bound by wishes of the



respondent. For this proposition, reliance was placed on the case of *Nyakundi v Standard Group PLC & Another* [2022] KECA 430 eKLR.

20. For these reasons, we were urged to dismiss the applicants' application with costs.
21. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the applicants' supplementary affidavit sworn on 22nd November 2023, the respondent's further affidavit sworn on 1st December 2023, the rival oral and written submissions by the parties, the cited authorities and the law.
22. The applicants' motion is brought inter alia under Rule (5)(2)(b) of this *Court's Rules*. The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay of execution or injunction as the case may have now taken a well beaten path. Firstly, an applicant has to satisfy the court that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle.
23. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. An applicant has to satisfy the Court on both limbs. These principles were summarized by this Court (differently constituted), in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* [2013] eKLR 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.
 - ii. The discretion of this Court under Rule 5(2) (b) to grant a stay of 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.
 - iv. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
 - v. An applicant must satisfy the Court on both the twin principles.
 - vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
 - 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.
 - 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.
 - ix. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - 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 will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved."
24. Turning to the first limb and as to whether the applicants intended appeal is arguable, we have looked at the annexed Draft Memorandum of Appeal and we are satisfied that the issues raised therein namely;



whether the learned judge failed to appreciate that the dispute's scope before her was limited to the matters set forth in the show cause letter dated 10th November 2022, failing to appreciate that the interlocutory orders did not confer any immunity or impunity to the respondent in respect of future misconduct and whether there was deliberate disobedience of court orders are not frivolous and are worthy of full consideration by this Court.

25. We are of course mindful to the fact that an arguable appeal is one that must not necessarily succeed and we will say no more regarding this issue at this stage, lest we embarrass the bench that will eventually be seized of the appeal. Ultimately, therefore we are satisfied that the applicants have an arguable appeal.
26. Turning to the nugatory aspect, it is common ground that the applicants have already been found guilty of contempt of court and they are now awaiting sentencing. There is therefore no doubt that the applicants are facing imminent risk of imprisonment and other penal consequences which in our view are irreversible and they will have lost their right to liberty and the substratum of the intended appeal will have been lost if stay orders are not granted.
27. The totality of our findings therefore, is that the applicants have satisfied both limbs under Rule 5 (2) (b) of the *Court of Appeal Rules* and are therefore deserving of an order of stay of execution pending the hearing and determination of their intended appeal.
28. In view of the above, we find merit in the applicants' motion dated 31st October 2023, which we accordingly allow and stay the execution/implementation of the ruling and orders delivered by the Employment and Labour Relations Court in Nakuru on 5th October 2023, pending the hearing and determination of the applicants intended appeal.
29. The costs of this motion shall abide the outcome of the intended appeal.
30. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 7TH DAY OF JUNE, 2024.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

