



Kenya Ports Authority Board of Directors v Republic & 3 others (Civil Application E106 of 2023) [2024] KECA 797 (KLR) (12 July 2024) (Ruling)

Neutral citation: [2024] KECA 797 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E106 OF 2023
SG KAIRU, AK MURGOR & KI LAIBUTA, JJA
JULY 12, 2024**

BETWEEN

KENYA PORTS AUTHORITY BOARD OF DIRECTORS APPLICANT

AND

REPUBLIC 1ST RESPONDENT

GENESIS FOR HUMAN RIGHTS COMMISSION 2ND RESPONDENT

CABINET SECRETARY MINISTRY OF TRANSPORT 3RD RESPONDENT

PUBLIC SERVICE COMMISSION 4TH RESPONDENT

(An application for stay of execution of the judgment of the Employment and Labour Relations Court at Mombasa (M. Mbaru, J.) delivered on 13th July 2023 pending hearing and determination of the appeal in ELRC Judicial Review Application No. JR E001 of 2022)

RULING

1. In an application presented to the Employment and Labour Relations Court (ELRC) at Mombasa, Genesis For Human Rights Commission (the 1st respondent), a non-governmental organisation, sought order of *certiorari* to quash the decision of the applicant, Kenya Ports Authority Board of Directors (KPA Board) dated 20th April 2022 to implement its proposed revised Human Resource Instruments and effect new staff appointments or deployments. Also sought was an order to prohibit KPA Board from implementing its said decision.
2. In its judgment delivered on 13th July 2023, the ELRC (M. Mbaru, J.) decreed that the resolution of KPA Board of 20th April 2022 on the implementation of the Human Resource Instruments of KPA that affect new appointments and deployments shall be subject to an audit by the Public Service Commission (PSC), which shall make recommendations that ensure efficiency and effectiveness; and



- that the audit process should be undertaken within six months at the cost of KPA, and that the PSC should make a report to court for adoption as appropriate.
3. Aggrieved, and intending to challenge that judgment, KPA Board filed a Notice of Appeal dated 18th July 2023. Before us now is its application dated 27th November 2023 seeking an order to stay execution of the said judgment pending hearing and determination of its appeal.
 4. In that regard, relying on the supporting affidavit of Elijah Kitur, the Head of Board Affairs and Regulatory Compliance and Governance of KPA, learned counsel for KPA Board, Mr. Khaseke, in his written and oral submissions, urged that the appeal is arguable; that it will be demonstrated during the hearing of the appeal that the learned Judge erred in failing to appreciate that the powers of the PSC under Article 234(2) are constrained and subject, in this case, to the [Kenya Ports Authority Act](#) and the [State Corporations Act](#); that the functions of the PSC are limited to offices established by it, and do not apply to offices in state corporations; that, in any event, the powers of the PSC are limited to making recommendations to either the public body in question, or to the President or to Parliament, and not to the court for adoption as the learned Judge wrongly ordered.
 5. It was urged that, unless the orders sought are granted, the appeal or intended appeal will be rendered nugatory; that the effect of the judgment is to suspend, pending the audit by PSC, the five Human Resource Instruments that were adopted by a special meeting of KPA Board to absorb employees of the defunct Kenya Ferry Services Limited; that 41 senior managers who were redeployed to KPA pursuant to those instruments will be affected; that, in the event that the PSC proceeds with the audit and the court adopts the same, the damage will be irreversible as the functions of KPA will be disrupted, and reversal would be costly, and that it would cause confusion within KPA.
 6. Although duly served with notice of the date for the hearing of the application, there was no appearance for the 1st respondent. Learned counsel Miss. N. Kiti instructed by the Attorney General on behalf of the 2nd respondent aligned with submissions by Mr. Khaseke in support of the application.
 7. In opposition to the application, learned counsel Ms. J. Manani for the PSC, the 3rd respondent, relying on a replying affidavit sworn by Dr. Simon K. Rotich, the Secretary/Chief Executive Officer of the PSC, urged in her written and oral submissions that the appeal or intended appeal is not arguable; that, under Article 234 of the [Constitution](#), the functions and powers of the PSC are exercisable over the entire public service, including State Corporations, and that the only exceptions are the offices set out under Article 234(3) of the [Constitution](#).
 8. It was urged that the intended appeal is not arguable as this Court, in the case of [The Public Service Commission v. Katiba Institute & others](#), Civil Appeal No. 638 of 2021, has settled the issues raised by the applicant; that, in that case, the Court ruled that State Corporations and parastatals form part of the public service; that there is no contention that KPA is a state corporation, and that PSC's powers, including the powers "to investigate, monitor and evaluate the organisation, administration and personnel practices" are exercisable by PSC over KPA; that, contrary to claims by the applicant that the impugned decision has created confusion, the converse is true as exemplified by similar court findings with regard to the human resource powers of the PSC involving other state corporations.
 9. It was urged that the applicant has not demonstrated how its appeal will be rendered nugatory if the orders sought are declined; that the argument that the 41 appointments will be affected if the orders sought are not granted is not in the public interest; that, should the appeal fail, the 41 appointments made pursuant to the unlawful human resource instruments will be nullified, in which case public funds will have been lost by way of salaries paid to persons found to have been appointed irregularly;



that, conversely, if the appeal succeeds, the employees will revert to their positions with entitlement to their salaries and allowances.

10. We have considered the application, the affidavits and the submissions. To succeed, the applicant is required to demonstrate that its appeal or intended appeal is arguable and that, unless the orders sought are granted, the appeal or intended appeal, if successful, will be rendered nugatory. See, *Trust Bank Limited and another v Investech Bank Limited and 3 others* [2000] eKLR.
11. In its memorandum of appeal, the applicant has raised issues, amongst others, regarding the powers of PSC contending that they are not absolute; and that the Judge erred in application of Article 234(2) of the *Constitution* to the applicant. On its part, the PSC has urged that the matter is already settled, and that its powers extend to state corporations, such as the applicant. Given those rival positions, and mindful, as we are, that an arguable appeal is not one that must necessarily succeed, and that a single bona fide issue is sufficient for this purpose, we do not think the intended appeal is frivolous. It is arguable. In that regard, see *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
12. On the nugatory aspect, the Court in the case of *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 observed that, that term is to be given its full meaning and does not only mean worthless, futile or invalid, but also means trifling. It is also an established principle that 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.
13. The applicant contends that implementation of the judgment will culminate in implementation of recommendations of the PSC once adopted as an order of the court, and will result in intrusion on the mandate of the applicant by PSC, which will occasion confusion and uncertainty. It is also urged that the applicant's Human Resource Instruments in question have been implemented and employees of Kenya Ferry Services absorbed. In the circumstances, we take the view that it will be less disruptive and in public interest to maintain the state of affairs as currently obtaining pending hearing and determination of the appeal.
14. In the result, we allow the application dated 27th November 2023 and hereby grant an order staying execution of the judgment of the ELRC delivered on 13th July 2023, and of any consequential orders ensuing therefrom pending the hearing and determination of the intended appeal.
15. Costs of the application will be in the appeal.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF JULY, 2024.

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

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A.K. MURGOR

JUDGE OF APPEAL

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DR. K. I. LAIBUTA, Carb, FCIArb

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

Signed

DEPUTY REGISTRAR

