



**Judicial Service Commission v Kisang (Civil Application  
E391 of 2022) [2024] KECA 1498 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1498 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E391 OF 2022  
SG KAIRU, F TUIYOTT & PM GACHOKA, JJA  
OCTOBER 25, 2024**

**BETWEEN**

**JUDICIAL SERVICE COMMISSION ..... APPLICANT**

**AND**

**PETER KIPKEMOI KISANG ..... RESPONDENT**

*(Being an application for stay of execution of the Judgment of the  
Employment and Labour Relations Court of Kenya at Nairobi (Ocharo,  
J.) dated 29th September, 2022 in ELRC Case. No. E521 of 2020)*

**RULING**

1. In its application dated 25<sup>th</sup> October 2022 Judicial Service Commission (JSC) seeks an order under Rule 5(2)(b) of the [Court of Appeal Rules](#) for stay of execution of the decree emanating from the judgment in favour of the respondent, Peter Kipkemoi Kisang, delivered on 29<sup>th</sup> September 2022 by the Employment and Labour Relations Court (ELRC) (Ocharo Kebira, J.) in Nairobi ELRC Cause No. E521 of 2020.
2. In that judgment, the ELRC found that JSC unfairly terminated the respondent's employment, ordered his reinstatement and payment of unpaid salary, allowances and benefits. Being dissatisfied with the judgment, JSC intends to challenge it before this Court having filed Civil Appeal No. E811 of 2022 and has in the meantime brought this application which was canvassed before us on 8<sup>th</sup> May 2024. Mr. D. Ochola, learned counsel, appeared for JSC while Mr. H. Kenei, learned counsel, appeared for the respondent. They relied on their respective written submissions which they orally highlighted.
3. Undoubtedly, under Rule 5(2)(b) of the [Court of Appeal Rules](#), the Court has the discretion to grant an order of stay of execution pending appeal if the applicant demonstrates that the appeal or intended appeal is arguable and not frivolous and that unless the order sought is granted, the appeal, if successful, would be rendered nugatory. In that regard counsel cited decisions in [Co-operative Bank of Kenya](#)



*Limited v Banking Insurance & Finance Union (Kenya)* [2017] eKLR; *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 232; and *Registered Trustees of the Anglican Church of Kenya v James Maina Maigwa & 2 others* [2017] eKLR.

4. JSC has raised several grounds of appeal in its Memorandum of Appeal. They include complaints that the learned Judge misapprehended the principles that a court must consider before making an order for reinstatement to employment; that the Judge erred in concluding that the respondent was dismissed without valid and fair reasons; that the Judge constituted himself as a disciplinary body and usurped JSC's mandate. Although the respondent in his replying affidavit and submissions maintains that the appeal is not arguable, upon a preliminary assessment, we find that the grounds of appeal are not frivolous and warrant further scrutiny by the Court. The appeal is arguable.
5. On the nugatory aspect, counsel for JSC submitted that if the judgment of the ELRC is not stayed, it will be in contempt. On the other hand, if it complies with the order for reinstatement and the appeal succeeds, the substratum of the appeal will have been taken away and the respondent will in the meantime have irregularly earned salaries he may never be able to refund. Counsel for the respondent submitted that nothing has been placed before the Court to demonstrate that the reinstatement of the respondent will render the appeal nugatory.
6. We are persuaded that if the order sought is not granted, and the respondent is reinstated to the sensitive position of Executive Officer, and the appeal succeeds, the appeal will be rendered nugatory as we also note that the respondent did not say anything about his ability to refund salaries that may ultimately be found to be refundable. There is also on record a further affidavit sworn by Anne Amadi, then Secretary of JSC, in which it is deponed that a warrant of arrest has already been sought against the Chief Registrar for failure to comply with the judgment.
7. In conclusion, having considered the application, the affidavits and the submissions of both parties against the applicable legal principles in applications of this nature, we are satisfied that the applicant has met the threshold for the grant of the orders sought.
8. Consequently, the application dated 25<sup>th</sup> October 2022 is hereby allowed in terms of prayer 3. We grant an order of stay of execution of the decree emanating from the judgment of the ELRC delivered on 29<sup>th</sup> September 2022 in ELRC Cause No. E521 of 2020 pending the hearing and determination of the appeal.
9. Costs of this application shall abide by the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**M. GACHOKA, C.Arb. FCIArb**

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**JUDGE OF APPEAL**



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

Signed

**DEPUTY REGISTRAR**

