



**Kenya Ports Authority Board of Directors & another v Western Human Rights Forum & 3 others (Civil Application E044 of 2024) [2024] KECA 1475 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1475 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E044 OF 2024  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
OCTOBER 25, 2024**

**BETWEEN**

**KENYA PORTS AUTHORITY BOARD OF DIRECTORS ..... 1<sup>ST</sup> APPLICANT**

**MANAGING DIRECTOR KENYA PORTS AUTHORITY ..... 2<sup>ND</sup> APPLICANT**

**AND**

**WESTERN HUMAN RIGHTS FORUM ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**FRANCIS ONYANGO ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution and proceedings pending appeal against the Ruling and Orders of the Employment and Labour Relations Court at Mombasa (M. Mbaru, J.) dated 25th January 2024 in Judicial Review Misc. App. E033 of 2023))*

**RULING**

1. From the scanty record as put to us, the 1<sup>st</sup> respondent, Western Human Rights Forum, filed an application dated 28<sup>th</sup> August 2023 in Judicial Review Misc. App. E033 of 2023 seeking: an order of certiorari to quash the applicants' decision to translate the 4<sup>th</sup> respondent, Francis Onyango, into the post of Assistant Harbour Inspectorate Officer, Post No. 610-4009 Grade APA7 (the position); an order of mandamus to compel the applicants to conduct a fresh translation process especially for the position aforesaid in accordance with the Kenya Ports Authority (KPA) Organizational Structure, Grading and Staff Establishment of 2021 (the structure); and an order of prohibition to bar the applicants from reinstating the 4<sup>th</sup> respondent as a Harbour Inspectorate Attendant. The 1<sup>st</sup> respondent also urged that the costs of their application be provided for.



2. In summary as gathered from the impugned ruling, the 1<sup>st</sup> respondent's case as pleaded in its application and the supporting affidavit of Eliakim Okayo (learned counsel for the 1<sup>st</sup> respondent), both of which are excluded from the record, was: that, under the structure, the qualifications for the position are entailed in the functional area operations, requiring a Bachelor's Degree, computer proficiency, and fulfillment of Chapter Six of *the Constitution*; that the 4<sup>th</sup> respondent did not attend secondary school, college or university to attain the academic qualifications and expertise required for the position; and that he was therefore disqualified to hold that position.
3. Opposing the application, the 1<sup>st</sup> applicant filed a replying affidavit of its Human Resource Officer, Daniel Okwiri, which is likewise excluded from the record. Gathering from the impugned ruling, the 1<sup>st</sup> applicant contended that, during its 412<sup>th</sup> Board meeting held on 10<sup>th</sup> March 2023, the management approved job reviews and allowed translation of employees to the reviewed structure based on experience, merit and qualifications; and that the 1<sup>st</sup> applicant acted within its powers which allowed the promotion of the 4<sup>th</sup> respondent.
4. Likewise, the 2<sup>nd</sup> respondent objected to the 1<sup>st</sup> respondent's application on the grounds that the 1<sup>st</sup> respondent had not demonstrated or specified what rights had been violated; that the 1<sup>st</sup> applicant's recruitment of employees was provided for under section 10(f) of the *Kenya Ports Authority Act*, and that the 2<sup>nd</sup> respondent was not involved in such matters.
5. On his part, the 4<sup>th</sup> respondent filed a replying affidavit (also not on record) in which he averred, inter alia: that the 1<sup>st</sup> respondent's application was focused on the merits of the decision to promote him rather than on the process; that judicial review applications concern themselves with the process rather than the merits of the impugned decision; that the trial court was being invited to determine the merits of his promotion, a matter not suited for judicial review.
6. The 3<sup>rd</sup> respondent filed written submissions (not on record) opposing the 1<sup>st</sup> respondent's application, and submitting that the 1<sup>st</sup> applicant can only translate positions in its establishment lawfully and procedurally within the human resource instruments approved by the 3<sup>rd</sup> respondent; and that this requirement was not met in the 4<sup>th</sup> respondent's case.
7. In its ruling dated 25<sup>th</sup> January 2024, the ELRC (M. Mbaru, J.) issued: an order of certiorari quashing the applicants' decision to translate the 4<sup>th</sup> respondent into the position aforesaid; an order of prohibition barring the applicants' appointment of the 4<sup>th</sup> respondent to the position outside approval of the 3<sup>rd</sup> respondent, the Public Service Commission; and an order that the applicants bear the costs due to the 1<sup>st</sup> and 3<sup>rd</sup> respondents. According to the learned Judge:

“The 1<sup>st</sup> respondent [the 1<sup>st</sup> applicant herein] as a state corporation cannot sanitise any appointment in its ranks without the sanction and approval of the 1<sup>st</sup> respondent. Holding of the 412<sup>th</sup> board meeting to pass a resolution following recommendations by SCAC with regard to its organisational structure and translation of offices, including that held by the 2<sup>nd</sup> interested party, without meeting the constitutional threshold, such translation is invalid.”
8. Dissatisfied by the decision of the ELRC, the applicants moved to this Court on appeal faulting the learned Judge for: failing to consider that the applicants' exercise of the powers under sections 9 and 10 of the *Kenya Ports Authority Act* was lawful, and had not been subject to any challenge; holding that the translation of offices by the applicants did not meet the constitutional threshold; disregarding the fact that the 1<sup>st</sup> respondent did not have locus standi to institute and maintain the judicial review proceedings.



9. Pending determination of their intended appeal, the applicants seek “temporary stay of proceedings and execution of judgment and decree of Honourable Justice Monica Mbaru made on 25<sup>th</sup> January 2024;” and that costs be in the cause.
10. Their Motion dated 5<sup>th</sup> March 2024 is supported by the annexed affidavit of Michael O. Sangoro, the 1<sup>st</sup> applicants’ Manager – Litigation and Disputes, sworn on an undisclosed date, and essentially deposing to the grounds on which their application is anchored, namely: that public interest would be best served by grant of the stay order sought; that the 1<sup>st</sup> respondent has expressed intention to enforce compliance with the decree against the applicants; that the applicants are apprehensive that the corporation’s ability to discharge its public duty and statutory mandate will suffer immense prejudice should execution proceed; that the applicants have an arguable appeal; that, unless the application is heard and determined, the applicants’ intended appeal, if successful, will be rendered nugatory as the effects of the decision would be irreversible; and that the ends of justice would be met by granting the relief by stay of execution.
11. In response to the applicants’ Motion, the 1<sup>st</sup> respondent filed a replying affidavit of John Obura, its director, sworn on 29<sup>th</sup> April 2024. Likewise, the 3<sup>rd</sup> respondent filed a replying affidavit of Remmy N. Mulati, the Acting Commission Secretary, sworn on 15<sup>th</sup> May 2024. In summary, the two deponents essentially aver that the applicants have not met the threshold for grant of the stay orders sought pursuant to rule 5(2) (b); that there are no pending proceedings before the trial court as judgment was delivered on 25<sup>th</sup> January 2024; and that there is nothing arising out of the impugned judgment that is capable of being stayed. We find nothing on record to suggest that those averments were rebutted or otherwise controverted.
12. On their part, the 2<sup>nd</sup> and 4<sup>th</sup> respondents did not file any affidavits in reply to the applicants’ Motion.
13. In support of the Motion, learned counsel for the applicants, M/s. Lumatete Muchai & Company filed written submissions, list of authorities and case digest dated 3<sup>rd</sup> May 2024. Submitting that the applicants have an arguable appeal, counsel cited the cases of Nairobi City Council vs. Tom Ojienda & Associates [2022] KECA 1326 (KLR); and Cabinet Secretary Ministry of Health vs. Joseph Enock Aura & 13 Others [2024] KECA 2 (KLR) for the proposition that an arguable appeal is not one that will succeed, but one that ought to be argued fully before the Court.
14. Further, learned counsel cited the case of Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR, submitting that the impugned decision poses the challenging possibility of use of public funds to redeploy personnel from various departments and offices in the pendency of the intended appeal. According to counsel, the intended appeal would be rendered nugatory absent stay of execution and proceedings. They urged us to allow the Motion.
15. Opposing the Motion, learned counsel for the 1<sup>st</sup> respondent, M/s. N. M. Kamwendwa & Company, filed written submissions and case digest dated 9<sup>th</sup> May 2024 citing the case of Western College of Arts and Applied Sciences vs. Oranga & Others (1976) KLR 63, submitting that this Court has no jurisdiction to stay execution pending appeal where there is nothing in the order of the High Court that can be enforced. They urged us to dismiss the Motion in limine with costs.
16. On his part, Principal Litigation Counsel for the 2<sup>nd</sup> respondent, Nimwaka K., filed written submissions dated 27<sup>th</sup> May 2024 citing the cases of Kenya Power and Lighting Company Limited vs. Esther Wanjiru Wokabi [2014] eKLR; and Global Tours and Travels Limited; Nairobi High Court Winding Up Cause No. 43 of 2000 (Unreported), highlighting the principles to be met for grant of orders to stay proceedings under rule 5(2) (b); and Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR, submitting that the applicants’ case is far from meeting the



principal requirements for a matter to be considered as of public interest. Likewise, counsel urged us to dismiss the applicants' Motion.

17. Finally, the 3<sup>rd</sup> respondent's Assistant Director Legal Services, Mr. Michael Maurice Ogosso, filed written submissions dated 15<sup>th</sup> May 2024 citing 8 judicial authorities, including the cases of Equity Bank Limited vs. West Link Mbo Limited [2023] eKLR, highlighting this Court's inherent discretionary jurisdiction under rule 5(2) (b); Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR, submitting that the applicants have failed to satisfy the twin principles for stay of execution or proceedings under rule 5(2) (b); National Bank of Kenya Limited & Another vs. Geoffrey Wahome Muotia [2016] eKLR; and Justus Kariuki Mate & Another vs. Martin Nyaga Wambora & Another [2014] eKLR, submitting that the applicants' draft memorandum of appeal does not raise even a single triable issue; and Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others (supra), submitting that the applicants have not demonstrated the nature of the public interest that would be threatened if the orders sought were not granted. Counsel submitted that the applicants have not demonstrated that they have an arguable appeal, or that the appeal, if successful, would be rendered nugatory if the orders sought were not granted. According to counsel, the applicants have not met the threshold for grant of orders under rule 5(2) (b) of the Rules of this Court.
18. As this Court has pronounced itself time and again, for an applicant to merit stay of execution or of proceedings pursuant to rule 5(2) (b) of the Court of Appeal Rules pending appeal, he or she must demonstrate to the satisfaction of the Court that he or she has an arguable appeal; and that the appeal (or intended appeal as the case may be), if successful, would be rendered nugatory if the orders sought were not granted. The two requirements constitute what is commonly referred to as the twin principles that must be satisfied before such orders can avail (see Anne Wanjiku Kibeh vs. Clement Kungu Waibara and IEBC [2020] eKLR; and Yellow Horse Inns Limited vs. A. A. Kawir Transporters & 4 Others [2014] eKLR ).
19. We also take to mind the fact that even one ground of appeal is adequate to satisfy the first limb of the twin principle. University of Nairobi vs. Ricatti Business of East Africa [2020] eKLR is a case in point.
20. The decisive question here is whether the applicants have demonstrated that they have an arguable appeal and, if the answer is in the affirmative, whether the impugned orders of certiorari and prohibition are indeed capable of being stayed; and whether there are proceedings pending in the ELRC capable of being stayed pending appeal. Further, if the answer to the foregoing questions are likewise in the affirmative, whether the applicants' appeal, if successful, would be rendered nugatory if the orders sought are not granted.
21. Turning to the question as to whether the applicants have an arguable appeal, we hasten to observe that the genesis of the dispute between the parties revolves around the questions as to whether the learned Judge was at fault: in quashing the applicants' decision made in exercise of its powers under sections 9 and 10 of the KPA Act; in finding that the applicants did not meet the constitutional threshold during the translation of the 4<sup>th</sup> respondent to the position in issue; and in disregarding the alleged fact that the 1<sup>st</sup> respondent had no locus standi to institute the judicial review proceedings
22. With regard to the 2<sup>nd</sup> limb of the twin principle, the term "nugatory" was defined in Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA p.227 at p.232 as "worthless, futile or invalid". It also means "trifling".
23. A cursory look at the grounds of appeal advanced in the applicants' memorandum of appeal dated 5<sup>th</sup> March 2024, viewed in the backdrop of the record as put to us, reveals substantive issues of law deserving of the Court's inquiry on second appeal. Moreover, even one ground of appeal suffices to



satisfy the first limb of the twin principle – see *University of Nairobi vs. Ricatti Business of East Africa* (supra).

24. Be that as it may, the uncontroverted position is that the ELRC rendered itself with finality on 25<sup>th</sup> January 2024 when it pronounced itself on the judicial review application and gave the impugned order subject of appeal to this Court. Our reading of the impugned ruling and orders does not reveal anything else left for determination by the ELRC. In the circumstances, there are no live proceedings to be stayed pending the intended appeal.

25. The remaining question is whether the impugned orders of certiorari and prohibition are capable of being stayed. We think not. This Court in *Republic vs. Public Procurement Administrative Review Board & 3 other Ex-parte Kenya Electricity Generating Company Ltd* [2010] eKLR had this to say on the matter:

“... from its nature, an order of certiorari cannot be stayed pending appeal by interlocutory proceedings. Rather it can only be set aside in the appeal itself.”

26. In *Republic vs. Municipal Council of Mombasa & 2 Others, Exparte – Adopt – A – Light Ltd*. Civil Application No. Nai. 15 of 2007 (unreported), this Court, referring to an application for stay of an order of certiorari, had this to say:

“The order of certiorari granted by the superior court is not capable of execution as the superior court did not order any party to do anything or refrain from doing anything or to pay any sum (of money) other than costs....

This Court has no jurisdiction at this stage to undo what the superior court has done. It can only reverse the order of certiorari upon the hearing of the appeal.”

27. Likewise, an order of prohibition issued in judicial review cannot, by its very nature, be stayed, lifted or reversed in interlocutory proceedings as sought. In *Kenya National Examinations Council vs. Republic; Ex Parte Geoffrey Gathenji Njoroge & Others* [1996] eKLR, this Court held as follows:

“... Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice .... Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice.” [Emphasis ours]

28. Asking this Court to stay or reverse a prohibitory order pending appeal is tantamount to praying for a license to conduct the appellants’ business in excess of jurisdiction or in contravention of statute law or other administrative procedures to which they must adhere for the time being. In effect, any order reversing prohibitory orders can only be made by this Court in determination of an appeal, but not in interlocutory proceedings as that would defeat the whole purpose of an appeal against such orders.

29. Having found that there are no proceedings pending in the ELRC capable of being stayed, and having also held that orders of certiorari and prohibition are incapable of being stayed or reverse in interlocutory proceedings pending appeal, we conclude that no useful purpose would be served by our pronouncement on the 2<sup>nd</sup> limb of the twin principles for grant of orders under rule 5(2) (b) of the Rules of this Court.



30. Having considered the applicants' Motion, the grounds on which it is made, the affidavits in support and in reply, the respective submissions in support and in opposition, the rival submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the applicants' Motion fails and is hereby dismissed with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Orders accordingly.

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

**A. K. MURGOR**

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA C.Arb, FCIArb.**

**JUDGE OF APPEAL**

**G. V. ODUNGA**

**JUDGE OF APPEAL**

I certify that this is the true copy of the original

signed

Deputy Registrar

