



**Kenya Revenue Authority v Masoud (Civil Application
E266 of 2022) [2023] KECA 206 (KLR) (24 February 2023) (Ruling)**

Neutral citation: [2023] KECA 206 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E266 OF 2022
DK MUSINGA, K M'INOTI & KI LAIBUTA, JJA
FEBRUARY 24, 2023**

BETWEEN

KENYA REVENUE AUTHORITY APPLICANT

AND

MUNIR ABUBAKAR MASOUD 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 Mombasa (Ongaya, J.) dated 22nd July 2022 in ELRCC No 906 of 2021)

RULING

RULING OF THE COURT

The respondent, Munir Abubakar Masoud, was employed by the defunct East African Customs & Excise Department on December 1, 1975. For purposes of this application, the Applicant, the Kenya Revenue Authority, is the successor of the defunct body. After serving for a period of 23 years, the Applicant retired the respondent in public interest on September 28, 1998. Some 18 years later, on November 25, 2016, the respondent filed a claim in the Employment & Labour Relations Court in Mombasa challenging his retirement, which he deemed to have been a dismissal.

In his claim, the respondent pleaded that the respondent and its predecessor considered him a disgruntled element and treated him in a discriminatory manner; that the respondent used him as a scapegoat for crimes committed by other officers who the applicant wanted to protect; and that the termination of his employment was unprocedural, illegal, malicious and in bad faith purely for purposes of settling scores. The

1. respondent prayed for a host of reliefs, among them “findings” that the respondent continuously targeted him for mistreatment, used him as a scapegoat to settle scores, improperly sacked and retired him, abused its powers for purposes of protecting corrupt elements and ultimately destroyed the



respondent's career. He also sought a declaration that the respondent had violated his rights, an order for adequate compensation and payment of back pay with interest until proper termination.

The applicant filed a response to the claim on September 6, 2017 in which it denied all the respondent's averments, and contended that it was not responsible for the respondent's allegations against its predecessor. The appellant added that it was in existence for only five years prior to the respondent's retirement in public interest, and was therefore not responsible for the respondent's tribulations, if any, before then. The applicant concluded by pleading that it treated the respondent fairly in accordance with the law, subjected him to fair disciplinary procedure in

2. accordance with the code of conduct, and properly retired him in public interest.

The parties called one witness each, and after considering the claim, by a judgment dated July 22, 2022, Ongaya, J. found that the applicant had violated the respondent's rights and freedoms and, in particular, his freedom from discrimination under section 82 (2) of the *former Constitution*. The court granted all the prayers sought by the respondent and awarded him Kshs 15,000,000.00 payable by October 1, 2022, failing which the amount would accrue interest at court rate from the date of judgment till payment in full. The respondent was also awarded costs of the suit. The applicant contends that in an addendum to the judgment issued post-judgment, the learned judge stated that the respondent was discriminated against on grounds of political opinion.

That judgment aggrieved the applicant, who filed a notice of appeal on July 25, 2022. The applicant then took out the motion on notice now before us, in which he seeks stay of

execution of the trial court's judgment pending the hearing

and determination of its appeal.

Before us, Mr. Osoro, learned counsel for the applicant, relied on his written submissions dated August 16, 2022 and list of authorities of even date as well as a supplementary list of authorities dated November 8, 2022, and submitted that the intended appeal, which is based on 8 grounds of appeal, is arguable. He contended that the trial court's finding that the appellant discriminated against the respondent because of his political opinion was irregular and not supported by any evidence. It was further contended that the trial court erred by taking into account irrelevant matters and, by transforming itself into an inquisitorial and fact-finding forum to determine the respondent's guilt or innocence of criminal charges.

On whether the intended appeal would be rendered nugatory if stay of execution is not granted, the applicant submitted that the amount awarded to the respondent was colossal and his ability to repay the money was not apparent to the extent that he was unemployed and had not demonstrated ability to refund that huge sum.

On his part, the respondent, who appeared in person, relied on his replying affidavit sworn on August 15, 2022 and written submissions dated August 22, 2022. The bulk of the replying affidavit is a narration of the history of the litigation and the wrong-doing he alleges against the applicant. As far as is relevant to the application for stay of execution, the respondent submitted that the application is an abuse of the process of the court, and that there was no evidence to show that the present application had been sanctioned by the relevant authority in the applicant. He added that he had never failed to pay any of his debts, and in the same spirit, he would repay the decretal amount should the appeal succeed.

We have carefully considered the judgment of the trial court, the application, the submissions by the parties and the authorities cited, which we do not deem necessary to rehash. To succeed on an application under rule 5(2)(b) of the *Court of Appeal Rules*, the applicant must demonstrate that he or she has an arguable appeal that risks being rendered nugatory if it succeeds after the decree of the



trial court has been executed. (*Githunguri v. Jimba Credit Corporation Ltd (No. 2)* [1988] KLR 838). Those two principles must be satisfied; it is not enough to satisfy only one. (*Republic v. Kenya Anti-Corruption Commission & 2 others* [2009] KLR 31).

3. It is trite that an arguable appeal need not actually succeed at the hearing. An arguable appeal is one that is not frivolous and raises even a single bona fide point worthy of consideration by the court. (*Ahmed Musa Ismael v. Kumba Ole Ntamorua & 4 others* [2014] eKLR). In determining whether an appeal is arguable, the Court is not required at this stage to make any definitive findings. That's the preserve of the bench that will hear the appeal.

What may render an appeal nugatory depends on the peculiar circumstances of each case. However, the overriding concern of the court is to ensure that a party who is exercising its constitutionally underpinned right of appeal does not end up with a pyrrhic victory in the sense that the status quo will have been irretrievably or irredeemably changed if the appellate court find in his or her favour. (*Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR).

4. Looking at the applicant's grounds of appeal, we are satisfied that the intended appeal is not frivolous and raises bona fide issues that deserve further consideration. In view of our limited remit in that regard, we shall not say more.

On whether the intended appeal will be rendered nugatory, we take note that the decretal amount is not pocket change, and is payable from public coffers. Other than his statement that he has always paid his debts, which we do not doubt, the respondent did not demonstrate the ability to repay the not-insignificant amount involved in this application.

Taking all the foregoing circumstances into account, we allow the motion dated July 27, 2022 and order stay of execution of the judgment of the Employment and Labour Relations Court dated July 22, 2022. However, considering the long history of this dispute and the respondent's expressed anxiety to bring closure to the matter, we direct the appellant to file and serve the record of appeal within the next forty-five

(45) days, and that the hearing of the appeal be fast-tracked. In default of filing the record of appeal as hereby directed, the order of stay of execution shall automatically lapse. As regards

5. costs of this application, the same shall abide the outcome of the appeal. It is so ordered.

Dated at Nairobi this 24th Day of February, 2023

D. K. MUSINGA (P.)

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

