



**Technical University of Kenya v Owour (Civil Application
E269 of 2020) [2023] KECA 103 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 103 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E269 OF 2020
HM OKWENGU, PO KIAGE & F SICHALE, JJA
FEBRUARY 3, 2023**

BETWEEN

TECHNICAL UNIVERSITY OF KENYA APPLICANT

AND

JOHN OMOLE OWOUR RESPONDENT

*(An application for stay pending appeal from the judgment of the
Employment and Labour Relations Court of Kenya at Nairobi
(Wasilwa, J.) dated 9th July, 2020 in ELR Petition No. 45 of 2017)*

RULING

1. By a motion dated August 25, 2020 and brought under Rule 5(2)(b) of the [Rules](#) of this Court, the applicant, Technical University of Kenya, in the main, sought;
 2. That there be stay of execution against the Judgment dated July 9, 2020 pending the hearing and determination of the intended appeal.
2. The motion, which is based on multiple grounds, is supported by an affidavit deposed by Ruth Kirwa, the applicant's Legal Secretary. It gives a brief background of the facts leading to this application.
3. The respondent, John Omole Owuor, was employed by the Teachers Service Commission on March 21, 1996. He was later seconded to the applicant as a senior lecturer *vide* the Kenya Polytechnic University College Order of 2007. He held the said position until his retirement from TSC some time in 2009. When his efforts to be absorbed by the applicant as a senior lecturer post-retirement failed, he petitioned the Employment and Labour Relations Court on February 5, 2018.
4. He claimed that the applicant maliciously and in bad faith discriminated against him by failing to absorb him into its administration when he retired yet it did the same for other lecturers. The learned Justice Wasilwa, J. held that because the appellant failed to explain why it failed to reinstate the



respondent despite doing the same for others, it had discriminated against him. She awarded him Kshs.5,000,000 in damages.

5. Aggrieved, the applicant filed a notice of appeal which gives us jurisdiction to hear and determine the Rule 5 (2) (b) application before us.
6. The applicant faulted the learned judge for finding that the applicant discriminated against the respondent. Moreover, there was no contractual relationship between the applicant and the respondent hence the former had no obligation to absorb him after his retirement. Further, there was no arrangement between TSC and the appellant concerning the appellant's future at the institution. Furthermore, the respondent failed to tender any evidence in support of the said discrimination. The applicant averred that it has an arguable appeal with a high chance of success, and the appeal will be rendered nugatory if the stay is not granted as the respondent will be at liberty to execute the judgment.
7. For an applicant to be successful he must show that he has an arguable appeal and that if the orders sought, be they of stay of execution or injunction, are not granted, the said appeal would be rendered nugatory or useless, illusory, academic and of no effect. An arguable appeal is simply one that raises at least one bona fide point that calls for a response from the respondent and is worthy of decision by the Court hearing the appeal. See, *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR and *Kieni Plains Co.ltd & 2 others vs. Ecobank Kenya Ltd*[2018] eKLR.
8. Having considered the application, we conclude that the grounds raised by the applicant are arguable and cannot be said to be frivolous. We are also satisfied that if the stay is not granted then the appeal shall be rendered nugatory as the respondent shall be free to execute the judgment. The two requirements are therefore met.
9. We therefore grant the injunction and stay of proceedings sought in the motion, which shall extend to the hearing and determination of the appeal.
10. The costs of the motion shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

