



**Serem v Tourist Regulatory & 3 others (Civil Application E038 of 2023) [2023] KECA 394 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 394 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E038 OF 2023  
DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA  
MARCH 31, 2023**

**BETWEEN**

**LUCY SEREM ..... APPLICANT**

**AND**

**TOURIST REGULATORY ..... 1<sup>ST</sup> RESPONDENT**

**KENNEDY LWENYI ..... 2<sup>ND</sup> RESPONDENT**

**FREDRICK JACK OMONDI ..... 3<sup>RD</sup> RESPONDENT**

**EARNEST SILA MATHURA ..... 4<sup>TH</sup> RESPONDENT**

*(Being application for stay of execution pending an intended appeal against the Judgment of the Employment and Labour Relations Court at Nairobi (Nduma, J.) dated 2nd February 2023 in Petition No. E028 of 2022)*

**RULING**

1. The Notice of Motion dated February 13, 2023 brought under Certificate of Urgency pursuant to rule 5(2) (b) of the [Court of Appeal Rules](#), 2010 and supported by the affidavit of even date sworn by Lucy Serem, seeks orders to stay execution by the respondents, and/or injunctive orders against the respondents from exercising any disciplinary process as against the applicant on the basis of the judgment of the Employment and Labour Relations Court, pending the hearing and determination of the application and the intended appeal.
2. In urging us to find merit in the application, the applicant submits that the appeal is arguable as some of the grounds of appeal include claims that despite being subjected to a flawed disciplinary process fraught with unfair labour practices contrary to the 1<sup>st</sup> respondent’s Human Resource Policy and Procedural Manual, the trial court nonetheless gave a nod to the process; and that the trial court



erroneously held that there is an element of public interest in carrying out a disciplinary process even if it violates the fundamental right of the employee to due process.

3. It is the applicant's contention that the appeal raises issues that have reasonable chances of success, and that the intended appeal will be rendered nugatory as an unlawful disciplinary process will be allowed to proceed unhindered.

Opposing the application, the respondent, through the replying affidavit dated March 3, 2023, and sworn by Carolyne Sein, argues that the application is moot as the applicant, having failed to respond to notices sent to her through various mediums, did not attend the disciplinary proceedings which were conducted ex-parte, and the result was her dismissal from employment, and therefore there is nothing that would be preserved by the orders sought; and that there is no substantive appeal on record as the applicant has failed to comply with certain unspecified procedural rules.

4. The respondent argued further, that it is a settled practice of the courts not to interfere with internal disciplinary proceedings of an organization, and, in circumstances where they do, it is entirely to ensure that proper procedure is applied, and not cease the proceedings on their own findings of the conduct of an employee, which is not the situation here; and that the orders would militate against public interest as the applicant will continue enjoying stay orders without making an attempt to respond to allegations against her at the relevant first port of call, whilst drawing a salary, and being absent from work for over a year.
5. In considering whether the applicant has satisfied the requirements necessary for granting an order for stay of execution, we are alive to pronouncements by the Supreme Court of Kenya in *Deynes Muriithi & 4 others v LSK & another* [2016] eKLR that rule 5(2) (b) of the *Court of Appeal Rules*, applications arise at an interlocutory stage, and the orders issued thereunder are for the purpose of protecting the subject matter of an appeal, the Court of Appeal having yet to finally determine the appeal.

In the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 others*, [2015] eKLR, the court stated:

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“(23) It is clear to us that rule 5(2) (b) of the Court of Appeal Rules, is essentially a tool for preservation. It safeguards the substratum of the Appeal in consonance with principles developed over the years...  
[“27] rule 5(2) (b) of the *Court of Appeal Rules*, is derived from article 164(3) of the *Constitution*. It illuminated the Court of Appeal's inherent discretionary jurisdiction to preserve the substratum of the Appeal/intended Appeal.”

This court has set out the parameters to be met for an order of stay to be granted in an application under rule 5(2) (b) of the *Court of Appeal Rules*. In the case of *Alferd Mincha Ndubi v Standard Limited* [2020] eKLR, this court quoted with approval the case of *Ishmael Kangunyi Thande v Housing Finance Company of Kenya Limited* [2007] eKLR that to succeed in an application in rule 5(2) (b) of the *Court of Appeal Rules*, the applicant has to establish existence of an arguable appeal; and that, in the event that the appeal succeeds, it is likely to be rendered nugatory if the injunction is not granted.

6. These principles were restated by this court in *Multi Media University & another vs. Prof. Gitile N. Naituli* [2011] eKLR that: “...from the long line of decided cases on rule 5(2) (b) of the *Court of Appeal Rules*, the jurisprudence is underlined in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & others* [2013] eKLR as follows:



- i. In dealing with rule 5(2) (b) of the *Court of Appeal Rules*, the court exercises original and discretionary jurisdiction,
  - ii. The discretion is wide and unfettered if it is just to do so,
  - iii. Court becomes seized of the matter only after Notice of Appeal is filed under Rule 75,
  - iv. In considering whether the appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances,
  - v. An applicant must satisfy the twin principles,
  - vi. Whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised,
  - vii. Arguable appeal is not one that will necessarily succeed but one which ought to be argued fully before court and is not frivolous,
  - viii. The court must not make a definitive/final finding as to facts of law in an application under rule 5(2) (b) of the *Court of Appeal Rules*,
  - ix. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible or if it is not reversible whether damages will reasonably compensate the aggrieved party”.
7. In considering whether the applicant has demonstrated that she has an arguable appeal, we note that in the case of *Wasike v Swala* [1984] KLR 591, this court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court.
8. In the case of *Attorney General v Okiya Omtata & another* [2019] eKLR, this court stated:
 

“the principles for our consideration in exercise of our unfettered discretion under rule 5(2) (b) of the Court of Appeal rules, to grant an order of stay is well settled. Firstly, the applicant must satisfy that it has an arguable appeal. However, this is not to say that the appeal will necessarily succeed but suffice it that the appeal is not idle or frivolous.”
9. This court has held in *Co-operative Bank of Kenya Ltd v Banking Insurance and Finance Union Kenya* [2014] eKLR that it is sufficient that the issues raised are arguable. In Kisumu Civil Appeal No 74 of 2016, *George O Gache & anor v Judith Akinyi Bonyo & others*, this court was categorical that: “at this stage the court is not expected to inquire into the merits of the case and whether or not the appeal will succeed. It is sufficient that the applicant has met the threshold as existence of a single bona fide issue is sufficient.”
10. On the issue of an arguable appeal, we take note that the applicant did not even subject herself to the disciplinary process as to find a footing to challenge the same. We further note that the judgment sought to be stayed merely dismissed the petition, and did not restrain any action nor order anything to be done. We are unable to find any arguable issue to warrant issuance of the orders sought, and hold that there is nothing to stay.
11. On the second limb regarding the appeal being rendered nugatory, this court has held in the case of *Reliance Bank Limited v Norlake Investment Limited* [2002]1 EA 227 that the factors which render an



appeal nugatory are to be considered within the circumstances of each case and in so doing the Court is bound to consider the conflicting claims of both sides. (see also Oraro & Rachier Advocates v Co-operative Bank of Kenya [1999] LLR 1118

12. In the case of African Safari Club Limited v Safe Rentals Limited, Nai Civil Application No 53 of 2010, this court held:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

13. This court has on several occasions stated that whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed, if allowed to happen, will be reversible or if not reversible, whether damages will reasonably compensate the aggrieved party.
14. Whereas we concur with the trial court’s findings that were the alleged flawed process be allowed to continue, the applicant has recourse through the appeal process to this Court, we must, however, point out that in the instant case, the applicant’s employment has already been terminated, so her fear of a flawed process being carried out has already bolted from the stable, and really there is nothing to stay. For good measure, our considered view is that if the appeal is determined in the applicant’s favour, then she can be compensated by way of damages in back salary, allowances - all these are monetary sums which can be computed and are compensable by an award of damages. In any event, the applicant has not shown that the 1<sup>st</sup> respondent is unable to refund/compensate her should the appeal succeed.
15. The upshot is that the applicant having failed to establish both limbs to satisfy the requirement under rule 5(2)(b) of this Court’s Rules, we find that the notice of motion dated February 13, 2023 lacks merit and the same is hereby dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 31<sup>st</sup> day of March, 2023.**

**D. K. MUSINGA, (P)**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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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**

