



**Kenya Revenue Authority v Kihara (Civil Appeal (Application)
E271 of 2022) [2023] KECA 275 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 275 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E271 OF 2022
HM OKWENGU, HA OMONDI & JM MATIVO, JJA
MARCH 17, 2023**

BETWEEN

KENYA REVENUE AUTHORITY APPLICANT

AND

JULIUS KAIYA KIHARA RESPONDENT

(Being an application for stay of execution pending the lodgment, hearing and determination of intended appeal against the Judgement of the Employment & Labour Relations Court of Kenya at Nairobi (Mbaru, J.) dated 29th July, 2022 in ELRC Petition No. E205 of 2021)

RULING

1. Vide an application dated 29th July, 2022 expressed under section 3A of the *Appellate Jurisdiction Act*, Rule 5(2) (b), 42 and 47 of the *Court of Appeal Rules*, 2010, the applicant seeks orders of stay of execution of the Judgment delivered in ELRC No. E 205 of 2021 (Mbaru, J.) on 29th July, 2022 pending the lodgment, hearing and determination of an intended appeal against the said judgment.
2. Briefly, the respondent filed a petition dated 11th December, 2021 seeking inter alia an order directing the applicant to reinstate him back to his office and employment status with full benefits. In response to the petition the applicant filed five (5) replying affidavits on 26th January, 2022. Subsequently, with leave of court, the respondent filed a supplementary affidavit dated 28th April, 2022. The applicant with leave of court filed two supplementary affidavits dated 11th May, 2022. The matter proceeded for hearing and both parties filed their respective submissions in the High Court. On 29th July, 2022 the High Court delivered its judgement in which it declared the respondent's termination from employment unfair and ordered his reinstatement to service as well as payment of back salaries within 45 days from the date of the Judgement.
3. Aggrieved by the Judgement, the applicant filed a notice of appeal dated 29th July, 2022 and also applied for typed proceedings from the Superior Court to enable it appeal against the Judgement. It is the



applicant's case that it has an arguable appeal because it verily believes inter alia that the learned judge's findings are contrary to law, facts and practice and if not stayed will amount to usurpation of the applicant's statutory and administrative mandate to employ and retain employees who meet its needs.

4. On the nugatory aspect, the applicant believes that the respondent will enforce the said judgement as there is no order of stay of execution in force to protect the interests of the applicant. Furthermore, incase this application for stay of execution is denied the intended appeal if successful will be rendered nugatory as the respondent shall have been paid salaries while he has rendered no services to the applicant against the well-established principle that salary is compensation for work done.
5. The application was opposed vide a replying affidavit sworn on 11th August, 2022 by the respondent. He deposed that he has devotedly served the authority for over 32 years and therefore having been out of employment for quite a long time, there is need to return back to work in order to cushion his financial needs but the applicant seems bent to humiliate him further by disallowing him to resume back to his employment without any valid reasons whatsoever. Consequently, the applicant's appeal is frivolous.
6. The respondent deposed that the applicant has not given sufficient reasons to warrant the issuance of an order of stay of execution which in any event has been overtaken by events and therefore it is futile for the court to grant an order of stay, and it is only fair and just that he be allowed to enjoy the fruits of his judgment as well as continue performing his official duties which he resumed on 1st August, 2022.
7. During the hearing, the parties confirmed that the respondent has since been reinstated to his employment, but despite this development, the applicant insisted on proceeding with the application arguing that it only complied with the court orders to avoid being cited for contempt of court.
8. Counsel for the applicant repeated the contents of the affidavit in support of the application and submitted that the draft grounds of appeal demonstrate an arguable appeal. Among the grounds raised by the applicant is that the learned judge erred in law and fact by failing to take cognizance of the respondent's own admission in a sworn affidavit that he had prepared the Performance Improvement Plan reports and had them signed before being issued with a notice to show cause on 3rd May, 2022.
Further, it is the applicant's contention that in issuing the remedy of reinstatement, the Superior Court failed to take into account the practicability of reinstatement as provided for under Section 49 (4) of the [Employment Act](#), 2007, which provides for the factors that should be taken into account in deciding the remedies to issue in a labour relations dispute.
9. On whether or not an appeal will be rendered nugatory, counsel submitted that it has demonstrated that the order directing the respondent to report back on duty on 1st August, 2022 is a final order which is irreversible, so, if the appeal was to succeed, the intended appeal will be rendered nugatory. Secondly, the applicant would have been coerced into an employer/employee relationship which has irretrievably broken down. Third, the respondent will have been paid salaries which the respondent will not be able to recover in the event the intended appeal is successful.
10. The respondent's counsel relied on his replying affidavit dated 19th August, 2022 and his written submissions. He argued that the applicant has since complied with the High Court orders and reinstated the respondent who has since been working for the applicant. This being the position, counsel argued that the orders having been complied with there is nothing to stay and what remains is hearing the appeal on merits.
11. In a brief rejoinder, the applicant's counsel argued that the applicant was coerced into complying with the order because there was a pending application for contempt and urged the court to grant the orders sought.



12. The law on the grant of orders under Rule 5(2)(b) of the Court of Appeal Rules (including injunction) is well settled as restated by this Court in *Chris Mungga N. Bichage v Richard Nyagaka Tongi & 2 Others* (2013) eKLR where the court succinctly set out the law as follows:

“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”

13. On the first principle, as to whether the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (2013) eKLR where this Court described an arguable appeal in the following terms:

vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. viii). In considering an application brought under Rule 5(2)(b) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

14. Turning to the matter at hand, the court is minded to avoid going into the merits of the intended appeal as this will be the preserve of the bench that will hear and determine the appeal. This Court has stated on numerous occasions that an arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration. A single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable. Looking at the applicant's draft Memorandum of Appeal, we are satisfied that in the circumstances of this case the applicant has an arguable appeal.

15. On the nugatory aspect, whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. (See: *Reliance Bank (in liquidation) v Norlake Investments Ltd*, (2002) 1 EA 227.) In *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* (2014) eKLR D.K. Maraga J.A. (as he then was) held:

“Courts have continued to set factors that need to be considered before this remedy of reinstatement is granted. The factors to consider include practicability and the ability of the employment relationship to withstand friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal...”

16. The above being the considerations, the question that calls for an answer is whether the nugatory aspect has been rendered moot considering the fact the applicant has since complied with the orders of the ELRC and has since reinstated the respondent. It was argued that the applicant complied with the said orders to avert contempt proceedings and owing to the delay in having this application heard and determined. Without delving into the merits of the appeal, ordinarily, a reinstatement will not be ordered if the employer/employee relationship has irretrievably broken down or where the reinstatement of the employee will disrupt the internal processes and procedures relating to posting and allocation of duties to employees if the respondent's position has subsequently been filled by another officer.



17. Our concern at this stage is not the merits of the order of reinstatement, but whether the appeal will be rendered nugatory. As admitted, the respondent was reinstated. He is now in the respondent's payroll. Much as the applicant cited discomfort in working with respondent, by reinstating the respondent, albeit in compliance with the orders appealed against, the applicant largely compromised the nugatory aspect of his application. The applicant had the option of challenging the contempt application, but opted to comply with the court orders. In any case, the appeal has not been rendered nugatory to the extent that the reinstatement is reversible should the applicant succeed in its appeal. We find and hold that in the peculiar circumstances of this case, the nugatory aspect has been overtaken by events and therefore this second limb has not been satisfied. The upshot of the foregoing is that this application is dismissed with no orders as to costs.
18. However, we are fully aware that employment disputes are critical in that they affect the relationship between the employer and the employee. Such issues therefore must be given priority, and for this reason we direct the applicant to file and serve the appeal within 60 days from the date of this ruling (if the appeal has not been filed). We also direct that the appeal be fixed for hearing on priority basis.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

