



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Revenue Authority v Matakwa (Civil Application
E130 of 2022) [2023] KECA 285 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 285 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E130 OF 2022
DK MUSINGA, K M'INOTI & KI LAIBUTA, JJA
MARCH 17, 2023**

BETWEEN

KENYA REVENUE AUTHORITY APPLICANT

AND

EMY AMWAYI MATAKWA RESPONDENT

(Being an application brought under section 3A of the Appellate Jurisdiction Act, and rules 5 (2) (b), 42 and 47 of the Court of Appeal Rules, (2010), seeking stay of execution of the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (Rika, J.) dated and delivered on 29th March 2022)

RULING

1. Before this court is a notice of motion dated April 21, 2022 which seeks stay of execution of the judgment delivered by Rika, J on March 29, 2022 in the Employment and Labour Relations Court at Nairobi (ELRC) Cause No 1395 of 2018, pending hearing and determination of an intended appeal.
2. The background to this application as borne out by the amended memorandum of claim filed by the respondent in the ELRC is that the respondent was employed by the applicant as a Clerical Officer grade 14, under the domestic tax department, vide a letter of appointment dated March 31, 2006. She was later moved to customs department, where she worked until March 1, 2012 when she was interdicted on various grounds. Her contract was terminated more than 6 years later, on August 31, 2018, she alleges, contrary to the law and applicant's code of conduct.
3. She stated that there was an ongoing criminal case against her relating to the same subject, and that she was therefore subjected to double jeopardy. The Investigating Officer exonerated her, yet the applicant took her through a disciplinary process and eventually terminated her contract. It was her position that some of her colleagues, who were suspected of involvement in the same employment offences, were



never interdicted or dismissed. Some continued to work normally, and eventually retired and were paid their benefits. She argued that her termination was discriminatory.

4. The main orders which the respondent sought against the applicant included: - a declaration that the termination of her employment was illegal, null and void; an order for reinstatement; compensation; general damages; costs and interest. In the alternative, she prayed for damages for unlawful termination of employment; costs and interest.
5. After a full trial, the court found no valid reason or reasons to justify termination of the respondent's contract of employment. According to the court, the respondent was a whistleblower, whose only fault was in whistleblowing. The administrative process conducted by the applicant did not yield any proof that the respondent was involved in fraudulent release of containers from the port. On the remedy of reinstatement, the court held that the 3-year limit from the date of termination imposed on the remedy under section 12 [3] [vii] of the *Employment and Labour Relations Court Act* had expired. The remedy of reinstatement was therefore not legally available to the respondent. However, section 49 [3] [b] of the *Employment Act* allows the court to grant the remedy of re-engagement in work comparable to that in which the employee was employed prior to his/her dismissal, or other reasonably suitable work, at the same salary. The court found that this remedy is not subject to the limitation imposed under section 12 [3] [vii] of the *Employment and Labour Relations Court Act*.
6. In sum, the court declared that termination of the respondent's contract was unfair; ordered the applicant to re-engage the respondent to work comparable to that in which she was employed prior to her dismissal, or other suitable work on the same salary; ordered the applicant to pay to the respondent withheld salary for the period of interdiction [2012-2018], or in the alternative to the order of re-engagement, the applicant to pay to the respondent compensation equivalent to 12 months' gross salary at Kshs 1,752,000; 3 months' salary in lieu of notice at Kshs 438,000; withheld salary for the period of interdiction [2012-2018]; and full pension; the respondent to communicate to the applicant in writing her option (re- engagement or payment of damages) within 14 days of the judgment; the applicant to act on the option communicated by the respondent within 30 days of receiving respondent's communication; costs to the respondent; and interest at court rates from the date of the judgment till the judgment is satisfied in full.
7. Being aggrieved by that decision, the applicant instituted an appeal before this court on which it has anchored this notice of motion. Although the applicant makes reference to a draft memorandum of appeal marked as "KRA-5" and which is annexed to the affidavit of Wilson Gaconi, the applicant's Chief Manager in the human resource department, the said annexure is missing from the supporting documents. The grounds upon which the applicant states that its intended appeal is arguable are, however, discernible on the face of the motion itself and in the supporting affidavit by Wilson Gaconi. The applicants state, *inter alia*, that the learned trial judge erred in law and in fact by granting the respondent relief not sought in her claim; that the respondent sought for reinstatement but the trial court granted an order of re- engagement thus disregarding the provisions of section 49(3) of the *Employment Act*; that the learned judge erred in law by disregarding the three-year limit prescribed by section 12 (3) (vii) *Employment and the Labour Relations Act* by disregarding the concept of mutuality in employment relations; and by giving the respondent a choice of the remedy she preferred and thereby elevated her rights over those of the applicant.
8. The applicant urged this court to find that the intended appeal is arguable.
9. On the nugatory aspect, the applicant contended that if the order sought is not granted, the intended appeal, if successful, will be rendered nugatory as the respondent shall have been paid salaries having not rendered any services to the applicant against the well-established principle that salary is compensation



for work done. Further, that in the event the applicant pays the salary arrears to the respondent as ordered by the trial court, the applicant is likely to suffer irreparable loss and damage in that the respondent, who is a woman of straw, may not be able to repay the salaries and allowances paid to her if the intended appeal is successful. The argument by the applicant is that it is a statutory body with perpetual succession under the law and is therefore capable of satisfying the decree of this court in the event that its intended appeal is unsuccessful.

10. The application is opposed by way of a replying affidavit sworn by the respondent on May 30, 2022. She avers that she communicated to the applicant the option of re-engagement as directed by the trial court, but that the applicant has declined to obey the orders of the trial court. For this reason, she states, that the applicant's Deputy Commissioner in charge of human resource is in contempt of court and asks this court to find that the applicant has come before it with unclean hands. She avers that she is a woman of means who can repay the judgment sum if the appeal succeeds. She therefore prays that the application be dismissed.
11. During the hearing of the application, Mr Leparashao, learned counsel for the applicant, relied heavily on his written submissions dated May 18, 2022 that cover the issues as summarized herein above. He stated that the applicant's Deputy Commissioner may be cited for contempt and indicated that an application for contempt orders had already been argued before the trial court and is now pending ruling on notice.
12. There was no appearance on behalf of the respondent despite service of the hearing notice upon her. That notwithstanding, we have perused through the respondent's written submissions dated May 30, 2022 and are of the view that they are a reiteration of the arguments contained in the replying affidavit.
13. The principles that guide this court in determination of an application under rule 5 (2) (b) of this court's Rules are well settled and have been set out in a plethora of the court's decisions. They have been well summarised in Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR. The twin test is that an applicant must demonstrate that the appeal or intended appeal is arguable; and that unless the orders sought are granted the appeal, if successful, shall be rendered nugatory.
14. We have considered the application, the written and oral submissions by all the parties. In determining whether the intended appeal is arguable or not, we are cognizant of the fact that 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. See Joseph Gitahi Gachau & another vs Pioneer Holdings (A) Ltd & 2 others, Civil Application No 124 of 2008. A single *bona fide* arguable ground of appeal is sufficient to satisfy this requirement. See the case of Damji Pragji Mandavia vs Sara Lee Household & Body Care (K) Ltd, Civil Application No Nai 345 of 2004.
15. The applicant argues, *inter alia*, that the learned judge erred by disregarding provisions of section 49 (3) of the Employment Act and by disregarding the 3-year limit prescribed by section 12 (3) (vii) of the Employment and Labour Relations Court Act. The arguments being advanced by the applicants are, in our view, not idle. On this basis, we are satisfied that the applicant has demonstrated that its intended appeal is arguable. We need not say much on arguability at this stage, lest we embarrass the bench that shall eventually hear the appeal.
16. Turning to the nugatory aspect, the applicant states that the order of re-engagement is against its wishes, which the trial court failed to take into account; and that if the applicant proceeds to pay salary arrears and allowances to the respondent, it will suffer irreparable loss and damage in the event its intended appeal is successful since the respondent is a woman of straw, who may not be able to repay the said amount. This argument was countered by the respondent who stated that she had the necessary means to repay any amount paid to her by the applicant in compliance with the impugned



orders of the trial court. This court in [University of Nairobi vs Ricatti Business of East Africa](#) [2020] eKLR stated thus:

“Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecunity, the onus shifts to the latter to rebut that allegation by evidence. See *International Laboratory for Research on Animal Diseases vs Kinyua*, [1990] KLR 403.”

17. The respondent did not provide any proof on her ability to repay any monies paid to her by the applicant in the event the intended appeal was successful. She has therefore not discharged her obligation. We are of the view that if we do not grant orders of stay as prayed by the applicant, the intended appeal shall be rendered nugatory as the applicant may never recover the monies paid to the respondent. The applicant is a statutory body with perpetual succession under the law and it is, in our view, capable of satisfying the decree of this court in the event that its intended appeal is unsuccessful. The applicant has therefore satisfied the second limb required for grant of orders of stay under rule 5 (2) (b) of this court’s [Rules](#).
18. For the foregoing reasons, we are satisfied that the applicant has established both limbs to deserve orders as prayed. Accordingly, we allow the notice of motion dated April 21, 2022. The costs of the application shall abide the outcome of the intended appeal.

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

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

K. M’INOTI

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed

DEPUTY REGISTRAR

