



**Judicial Service Commission v Omollo (Civil Application  
E037 of 2023) [2023] KECA 527 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 527 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E037 OF 2023  
K M'INOTI, HA OMONDI & KI LAIBUTA, JJA  
MAY 12, 2023**

**BETWEEN**

**JUDICIAL SERVICE COMMISSION ..... APPLICANT**

**AND**

**BENEDICT ABONYO OMOLLO ..... 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 Nairobi (Mbaru, J.) dated 9th February 2023 in ELCC No. 47 of 2015)*

**RULING**

1. Before us is the motion on notice dated February 13, 2023, taken out by the applicant, the Judicial Service Commission. The applicant seeks one substantive prayer, namely, stay of execution of the judgment and decree of the Employment and Labour Relations Court at Nairobi (Mbaru, J) dated February 9, 2023. The applicant filed a notice of appeal on February 10, 2023 within the period prescribed by rule 77(2) of the *Court of Appeal Rules* and is therefore properly before the Court for purposes of its application under rule 5(2)(b) of the *Court's Rules*.
2. The background to the application is briefly as follows. On or about July 1, 2012, the applicant employed the respondent, Benedict Abonyo Omollo, as director of finance in the Judiciary of Kenya. Following allegations of loss of Kshs 80,013,302.00 which the applicant attributed to the respondent's laxity, the applicant interdicted him on November 5, 2013. On June 24, 2014, the applicant served upon the respondent a notice to show cause why disciplinary action should not be taken against him for gross misconduct. The allegations against the respondent, included irregular payments, laxity at work, lack of professionalism, and irregularly authorising payment from deposit accounts, the details of which were tabulated in the notice signed by the Chief Registrar of the Judiciary.



3. Following a disciplinary hearing on November 7, 2014, in which the respondent participated and was represented by counsel, the applicant summarily dismissed the respondent on December 17, 2014. On January 19, 2015, the respondent filed a claim against the applicant in the Employment and Labour Relations Court (ELRC) at Nairobi for wrongful, unfair and unlawful termination of employment. By way of remedies, he prayed for a declaration that his termination was wrongful and unlawful, reinstatement, and payment of his salary and allowances from the date of interdiction. In the alternative, the respondent prayed for payment of his terminal dues, maximum compensation of 12 months' salary for wrongful termination, general damages for discrimination, costs and interest.
4. Simultaneous with the claim, the respondent applied for an injunction to restrain the applicant from advertising or filling the vacancy in the office of director of finance in the Judiciary pending the hearing and determination of the claim. The prayer for interim relief was granted, but subsequently vacated on March 3, 2015 following inter partes hearing of the application. In the fullness of time, the applicant filled the vacancy created by the respondent's termination.
5. Ultimately, Mbaru, J heard the substantive claim and in the judgment dated February 9, 2023 which is impugned in the intended appeal, found in favour of the respondent and awarded the following reliefs:
  - a. a declaration that the applicant terminated the respondent's employment unfairly;
  - b. a declaration that the applicant discriminated against the respondent on grounds of ethnicity;
  - c. award of Kshs 2,000,000 to the respondent for discrimination;
  - d. an order directing the applicant to re-engage the respondent as a new employee on the same or similar terms as he held on December 17, 2015 (sic) with effect from the date of the judgment;
  - e. an order for the respondent to report to the office of the Chief Registrar of the Judiciary on February 13, 2023;
  - f. award of Kshs 9,057,750.00 being the respondent's withheld salary during the period of interdiction, with interest at court rates from December 17, 2014 until payment in full; and
  - g. award of costs of the suit to the respondent.
6. Those orders aggrieved the applicant resulting in the application now before us. The applicant, represented by Mr Issa and Ms Agwata, learned counsel, submitted, both in its written submissions dated March 13, 2023 and oral highlights during online hearing on March 15, 2023, that its intended appeal is arguable and has great chances of success. Relying on its draft memorandum of appeal in which 13 grounds of appeal have been set forth, the applicant submitted that there were arguable and weighty issues that this Court will be called upon to determine at the hearing of the appeal, among them: whether the learned judge acted in excess of jurisdiction by holding that the notice to show cause that the applicant served upon the respondent was invalid whilst a judge of concurrent jurisdiction had earlier on held that the same notice to show cause was valid; whether the order to re-engage the respondent was in violation of Article 172(1)(b)(ii) of the *Constitution* which vests in the applicant the power to review and make recommendations on the conditions of service of staff of the Judiciary; and whether the said order for re-engagement amounts to usurpation of the said powers of the applicant.
7. The applicant further contended that it was arguable whether the learned judge erred by ordering the applicant to re-engage the respondent whilst the respondent had not prayed for such remedy; whether the learned judge erred by ordering the applicant to re-engage the respondent without regard to the practicability of reinstatement or re-engagement as required by section 49(4) of the *Employment Act*; whether the learned judge erred by ordering the applicant to re-engage the respondent who had been



- dismissed for nearly ten years, despite section 12(3) (viii) of the *Employment and Labour Relations Court Act*, which allows such remedy only within three years of dismissal; and whether the respondent had proved discrimination to the required standard.
8. Turning to whether the intended appeal risked being rendered nugatory absent an order of stay of execution, the applicant submitted that the office of director of finance in the Judiciary was not vacant and that there was no similar office in existence to which the respondent could be re-engaged. It was contended that to re-engage the respondent in a non-existent office or to create the office of director of finance without portfolio would cause great hardship and confusion in the Judiciary. The applicant further submitted that the respondent was in fact currently employed as a member of the County Executive in Siaya County in charge of Finance and Economic Planning and that it would be untenable to re-engage him in the Judiciary whilst he was serving in another substantive office from which he had not resigned. Lastly, the applicant urged that the total amount awarded to the applicant was substantial, and that the respondent had not indicated that he had the means to repay the amount should the appeal succeed.
  9. For the above reasons, the applicant prayed that its application be allowed with costs.
  10. The respondent opposed the application through his replying affidavit sworn on March 6, 2023, written submissions dated March 6, 2023 and list of authorities dated March 13, 2023. The respondent presented a detailed narrative of his employment, the genesis of the claim and his prosecution and acquittal for criminal offences related to the theft of the Judiciary money, which is not necessary to rehash for the purposes of the application before us.
  11. As far as is relevant to the application, the substance of the response is that the intended appeal is not arguable because the grounds for the respondent's dismissal were fabricated, and that the dismissal itself as wrongful and unfair. It was the respondent's contention that it is settled law that disciplinary powers vested in the applicant may be delegated only to the Chief Justice and not to the Chief Registrar of the Judiciary; that he was validly awarded the remedy of re-engagement because he had prayed for reinstatement; that the order for re-engagement was made within the prescribed time because he had filed his claim within three years of his dismissal and that in any event, there is no time limit within which an order for re-engagement should be made.
  12. The respondent further submitted that, notwithstanding the fact that there was no vacancy in the office of Director of Finance, he could be re-engaged in a comparable office in the Judiciary; that he was in gainful employment and would be able to repay the decretal amount if the intended appeal succeeded; that he stood to suffer more hardship than the applicant in the event of an order of state of execution, and that in the event the Court was minded to grant stay of execution, it should be on condition that the applicant pays to him the decretal amount. Lastly, on his employment with Siaya County, the respondent submitted that the applicant had first to re-engage him before he could resign.
  13. We have anxiously considered the application, the submissions by learned counsel and the authorities which they cited. Both parties are in agreement that, to obtain an order of stay of execution, the applicant must establish, firstly, that its intended appeal is arguable and, secondly, that unless stay of execution is granted, the appeal will be rendered nugatory if it succeeds. Indeed, that is the test that has been adopted by the Court in a consistent line of decisions (see *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2013] eKLR). Both requirements must be satisfied, otherwise the applicant will not be entitled to an order of stay of execution if it satisfies only one of the requirements (see *Republic v Kenya Anti-Corruption Commission & 2 Others* [2009] KLR 31).
  14. On the first consideration of an arguable appeal, the pertinent principles are that an arguable appeal is not one which must necessarily succeed. It is simply an appeal that raises a bona fide arguable point that



deserves to be considered and determined by the Court. In other words, an arguable appeal is one that is not frivolous (see *Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union*, Civil Application No Nai 72 of 2001). To establish an arguable appeal, the applicant does not have to present a multiplicity of grounds. Even a single *bona fide* ground will suffice (see *Abmed Musa Ismael v Kumba Ole Ntamorua & 4 others* [2014] eKLR).

15. We are satisfied that the applicant's intended appeal is not frivolous. Among the issues that the applicant has identified as deserving to be heard and determined by the Court include whether the ELRC granted a remedy which the respondent had not prayed for and on which the parties had not addressed the court; whether the three year limitation under section 12(3) (viii) of the *Employment and Labour Relations Court Act* applies only to the remedy of reinstatement or whether it applies to both reinstatement and re-engagement; whether the filing of a claim within three years of dismissal stops the running of the prescribed three year limitation; and whether the respondent proved unconstitutional discrimination to the required standard, among others. At this stage, we are obliged not to say more on the intended appeal lest we stray into a domain that is not ours (see *Central Bank of Kenya Deposit Protection Fund Board v Uhuru Highway Development Ltd & Others*, CA No 95 of 1999).
16. As regards the second consideration of whether the intended appeal risks being rendered nugatory, the pertinent principles are firstly, that what will render an appeal nugatory depends on the peculiar circumstances of the case (see *Reliance Bank Ltd v Norlake Investments Ltd* (2002) 1 EA 227). Secondly, the Court's utmost concern is to ensure that a successful appeal does not end up as a mere pyrrhic victory or paper judgment (see *Hashmuklal Virchand Shah & 2 Others v Investment & Mortgage Bank Ltd* [2014] eKLR). Thirdly, the Court will grant stay of execution if what is apprehended cannot be undone once it happens or cannot be undone without undue hardship or expense, or cannot be adequately compensated by award of damages (see *Stanley Kangethe Kinyanjui v Tony Ketter & Others* (supra)). Lastly, the Court also takes into account the respective hardship that an order of stay of execution is likely to wrought on the parties (see *Nation Media Group & 2 Others vs John Joseph Kamotho & 3 Others*, Civil Application No 108 of 2006).
17. Both the applicant and the respondent agree that presently there is no vacancy in the office of Director of Finance in the Judiciary and none of them has identified exactly what office in the Judiciary would be similar to that of Director of Finance. The Respondent is already in gainful employment, which in a way ameliorates his hardship. We agree with the applicant that unless we grant an order of stay of execution, there is a serious likelihood of confusion and chaos in the Directorate of Finance at the Judiciary, which cannot be easily undone in the event of the appeal succeeding. In the circumstances, the applicant has satisfied both requirements under rule 5(2)(b).
18. Accordingly, we direct that there shall be a stay of execution of the judgment and decree of the ELRC dated February 9, 2023 until the hearing and determination of the intended appeal. Costs of this application shall abide the outcome of the appeal. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY, 2023**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**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**

