



**Kenyatta University v Nyaga & 25 others (Civil Application
E027 of 2022) [2023] KECA 561 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 561 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E027 OF 2022
W KARANJA, FA OCHIENG & LK KIMARU, JJA
MAY 12, 2023**

BETWEEN

KENYATTA UNIVERSITY APPLICANT

AND

HUMPHREY NYAGA & 25 OTHERS RESPONDENT

(An application for stay of execution pending the hearing and determination of the application as well as pending the hearing and determination of the intended Appeal from the decision of the Employment and Labour Relations Court of Kenya at Nairobi (M. Mbaru, J. dated and delivered on 10th December, 2021 in Petition No. 93 of 2018)

RULING

1. Before us is a motion on notice application dated 24th January, 2022 in which the applicant prays for stay of execution of the judgment of the Employment & Labour Relations Court (Mbaru, J.) dated 10th December, 2021 pending the hearing and determination of this application and the intended appeal.
2. A brief history of the application is that the respondents were employed by the applicant on renewable short term contracts subject to availability of work. A dispute arose when the respondents contended that they were entitled to be converted to permanent employees due to long service with the applicant. The applicant on the other hand maintained that it was entitled to hire the respondents on short term contracts of 3 months or so.
3. The respondents moved the trial court and judgment was delivered in their favour leading to the present application.
4. The application is brought under Rules 5(2)(b) and 47 of the *Court of Appeal Rules* and Sections 3, 3A and 3B of the *Appellate Jurisdiction Act*. It is premised on the grounds that: the 30 days' period given to comply with the court orders was limited; the learned Judge erred in several material ways; implementation of the impugned judgment would cause considerable difficulties to the applicant; it



is in the interest of justice for the judgment and decree to be stayed; execution of the judgment and decree will cause prejudice to the applicant; there is an imminent danger that if stay of execution is not granted the applicant will be forced to absorb the respondents into permanent employment and pay the monetary award granted by the trial court; and that the intended appeal raises substantial arguable issues of law and has overwhelming prospects of success.

5. The application was further supported by the affidavit of Prof. Paul Okemo, the acting Deputy Vice Chancellor (Administration) of the applicant in which he reiterated the grounds on the face of the application. In his supplementary affidavit, two issues were raised; he faulted the learned Judge for making a finding that the respondents were discriminated upon; and also contended that the trial court had no jurisdiction to convert fixed term contracts to contracts for permanent employment; he contended that due weight was not given to the applicant's submissions; he reiterated that the appeal would be rendered nugatory due to reasons cited in the grounds on the face of the application; that the applicant's *modus operandi* of engaging employees on short term contracts is recognized by the government; and that due to scarcity of funds, the applicant should not be exposed to wastage of public funds.
6. The application was opposed vide a replying affidavit sworn by Humphrey Nyaga Thomas, the 1st respondent on his behalf and on behalf of the other 25 respondents. He deponed that the impugned judgment was in their favour and they were desirous of executing the same at the earliest; the applicant has failed to comply with the orders as directed within 30 days; the orders sought by the applicant are incapable of enforcement and are intended to deny them the fruits of the judgment; no good or reasonable basis has been laid out to warrant stay; the application lacks merit and is misconceived; the intended appeal is neither arguable nor capable of succeeding; the applicant's memo dated 9th July, 2018 was rendered null and void and of no legal force by the impugned judgment; and that the application be dismissed with costs.
7. The application was canvassed by way of written submissions. The applicant maintained that it had an arguable appeal as demonstrated in the annexed memorandum of appeal and the substantive appeal, Civil Appeal No. 494 of 2022. The applicant relied on two grounds in the supplementary affidavit; that there was no basis for discrimination; and whether the respondents were casual employees or they were employed on a fixed term contract.
8. On the nugatory aspect, the applicant stated that it would be forced to absorb the respondents into permanent employment, and should the appeal succeed thereafter, the applicant would suffer irreparable loss. The applicant was of the view that the respondents, who include; plumbers, masons, carpenters and painters are not required on a daily basis especially due to little construction taking place at the University. The applicant submitted that another issue that would limit absorbing the respondents into permanent was reduced funding by the government and the strategic plan of the applicant.
9. The applicant further submitted that it was not persuaded that if they paid the respondents the judgment award, the respondents would be able to refund the monetary award in the event the intended appeal succeeds. The applicant concluded by stating that it would be in public interest that stay of execution is granted given that the applicant is reliant on tax payers money.
10. The respondents on the other hand contended that the applicant did not have an arguable appeal and the annexed draft memorandum of appeal lack merit, are misconceived and did not point out any legal error committed by the trial court.
11. As regards the nugatory aspect, the respondents contended that they had been denied their lawful dues since 2018 when they were unlawfully shut out of their employment. The majority of the respondents



are jobless and were thus ravaged by the harsh economic situations and denying them the fruits of the judgment would be a great injustice. To buttress their submissions, they relied on the following authorities *County Government Secretary/Chief Executive Officer Homabay County Government & Anor v Lilian Purity Nyajowi & 6 Others* [2020] eKLR and *Kenya Medical Laboratory Technicians & Technologists & 7 Others v Attorney General & Others* [2020] eKLR and urged the court to dismiss the application.

12. Having considered the application, the grounds in support thereof, the various affidavits, submissions by counsel and the law, we take cognizance of the fact that the jurisdiction of this Court under Rule 5(2)(b) is original, independent and discretionary. The discretion is to be exercised judiciously and with reason; not on impulse or pity.
13. Rule 5(2)(b) is a procedural innovation designed to enable the court to preserve the subject matter of an appeal where one has been filed or an intended appeal where the notice of appeal has been filed. In the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR this Court stated inter alia:

“That in dealing with Rule 5(2)(b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court.”

The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”
14. In the present application, for the applicant to be successful, it must demonstrate that it has an arguable appeal which is not frivolous. Upon satisfying that principle, it has the additional duty to demonstrate that the appeal, if successful would be rendered nugatory in the absence of an order of stay. (See: *Trust Bank Limited & Anor. v Investech Bank Limited & 3 Others*, Civil Application Nai. 258 of 1999 (unreported)).
15. In determining whether the appeal is arguable or not, it is trite that by arguable it does not mean the appeal must be one that ought to succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the Court. (See *Dennis Mogambi Mang'are v Attorney General & 3 Others*).
16. On whether the applicant has established an arguable appeal, we have considered the applicant’s annexed draft memorandum of appeal. Among the issues raised and emphasized by the applicant which we think merit consideration by this Court is the contention of the award based on discrimination and the issue of whether a fixed term contract can be converted to permanent employment. On the other hand, the respondents argued that the intended appeal lacked merit and did not raise any legal point. This contestation can only be determined at a full hearing. Therefore, this and the other issues raised in the memorandum of appeal are in our considered view not frivolous.
17. On whether the appeal will be rendered nugatory should the impugned judgment not be stayed, we note that factors which can render an appeal nugatory are to be considered within the circumstances of each particular case and in doing so, the court is bound to consider the conflicting claims of both sides.
18. It is common ground that the respondents are desirous of executing the judgment at the earliest opportunity. The applicant is apprehensive that should it pay the respondents the award, the respondents may not be in a position to refund the same should it succeed in the appeal. Further, the applicant stated that the nature of the respondents’ job description was only required on a need basis. Employing the respondents on a permanent basis would be a financial burden to the tax payer since



its services are of a public nature. In *Reliance Bank Ltd v Norlake Investments Ltd* [2002] EA 227, this Court while faced with almost similar facts stated:

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.” (Emphasis ours).

19. In the circumstances of the present case, we are persuaded that the applicant has demonstrated an arguable appeal which will be rendered nugatory should stay not be granted. We so hold because if the applicant was compelled to employ on a permanent basis, persons who would ordinarily only be engaged on a need basis, the applicant would have to carry a huge financial burden, which it would be unlikely to recover, if the appeal were to ultimately succeed. In our considered opinion justice demands that the court should guard against such wanton use of public funds.
20. Accordingly, the application dated 24th January, 2020 is allowed. Costs shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

W. KARANJA

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

