



**Egerton University & 3 others v University Academic Staff Union Egerton University Chapter  
& 4 others (Civil Application E102 of 2022 & Civil Appeal (Application) E155 of 2022  
& E002 of 2023 (Consolidated)) [2023] KECA 795 (KLR) (30 June 2023) (Ruling)**

Neutral citation: [2023] KECA 795 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E102 OF 2022 & CIVIL APPEAL  
(APPLICATION) E155 OF 2022 & E002 OF 2023 (CONSOLIDATED)**

**F SICHALE, FA OCHIENG & LA ACHODE, JJA**

**JUNE 30, 2023**

**BETWEEN**

**EGERTON UNIVERSITY ..... 1<sup>ST</sup> APPLICANT  
THE COUNCIL, EGERTON UNIVERSITY ..... 2<sup>ND</sup> APPLICANT  
THE VICE CHANCELLOR, EGERTON UNIVERSITY ..... 3<sup>RD</sup> APPLICANT**

**AND**

**UNIVERSITY ACADEMIC STAFF UNION EGERTON UNIVERSITY  
CHAPTER ..... RESPONDENT**

**AS CONSOLIDATED WITH  
CIVIL APPEAL (APPLICATION) E155 OF 2022**

**BETWEEN**

**THE VICE CHANCELLOR, EGERTON UNIVERSITY ..... APPLICANT**

**AND**

**UNIVERSITY ACADEMIC STAFF UNION ..... 1<sup>ST</sup> RESPONDENT  
EGERTON UNIVERSITY ..... 2<sup>ND</sup> RESPONDENT  
THE COUNCIL EGERTON UNIVERSITY ..... 3<sup>RD</sup> RESPONDENT**

**AS CONSOLIDATED WITH  
CIVIL APPEAL (APPLICATION) E002 OF 2023**



**BETWEEN**

**EGERTON UNIVERSITY ..... 1<sup>ST</sup> APPLICANT**

**THE COUNCIL, EGERTON UNIVERSITY ..... 2<sup>ND</sup> APPLICANT**

**THE VICE CHANCELLOR, EGERTON UNIVERSITY ..... 3<sup>RD</sup> APPLICANT**

**AND**

**UNIVERSITIES ACADEMIC STAFF UNION EGERTON UNIVERSITY**

**CHAPTER ..... RESPONDENT**

*(Being an application for stay of proceedings and execution of the decision and orders of the Employment and Labour Relations Court of Kenya at Nakuru (Nderitu, J), dated 7th December 2022) IN ELRC CAUSE NO. 16 OF 2022)*

**RULING**

1. Before us are 3 separate motions in which the applicants herein essentially seek stay of proceedings and execution of the decision and orders of the Employment and Labour Relations Court of Kenya at Nakuru (Nderitu, J), dated December 7, 2022.
2. The 1<sup>st</sup> motion is Civil Application No. E155 of 2022, dated 3<sup>rd</sup> January 2023, brought pursuant to the provisions of Articles 25 (c), 48, 50, 159 & 164 (3) of *the Constitution of Kenya 2010*, Section 3 and 5 of the *Court of Appeal (Organization and Administration) Act*, Section 3, 3A, & 3B of the *Appellate Jurisdiction Act* cap 9 of the Laws of Kenya, Rule 1 (2), 5 (2)(b) of the *Court of Appeal Rules, 2022* in which The Vice Chancellor, Egerton University (the applicant herein), seeks an order of stay of further proceedings in Nakuru ELRC Cause No. E016 of 2022, pending the hearing and determination of an intended appeal.
3. The applicant further seeks stay of execution of the Ruling and Orders of the ELRC Court in Nakuru ELRC Cause No. E016 of 2022, dated December 7, 2022, to the extent that the applicant will have no right of audience unless and until they have purged the contempt. The second motion is Civil Application No. E002 of 2023. The same is dated 16<sup>th</sup> January 2023 and is brought pursuant to the provisions of Articles 159 (2) (d) of *the Constitution* of Kenya 2010, Section 3 and 3A of the *Appellate Jurisdiction Act*, cap 9 of the Laws of Kenya and Rules 5 (2) (b) and 49 of the Court of Appeal Rules 2022, in which Egerton University, The Council, Egerton University and The Vice Chancellor, Egerton University (the applicants herein) seek an order of stay of proceedings in Nakuru ELRC No.16 of 2022 and the execution of the decision and orders of Nderitu J dated December 8, 2022, pending hearing and determination of the intended appeal.
4. The 3<sup>rd</sup> motion is Civil Application No. E102 of 2022. The same is dated December 23, 2022 and is brought pursuant to the provisions of Article 159 (2) (d) of *the Constitution* of Kenya 2010, Section 3 and 3A of the *Appellate Jurisdiction Act* cap 9 of the Laws of Kenya and Rules 5 (2) (b) and 49 of the *Court of Appeal Rules 2022*, in which Egerton University, The Council Egerton University and the Vice Chancellor, Egerton University (the applicants herein) seek stay of proceedings in Nakuru ELRC No. 16 of 202 and the execution of the decision and orders of Nderitu J dated December 7, 2022 and December 8, 2022 pending the hearing and determination of the intended appeal.



5. When the matter came up for plenary hearing on February 22, 2023, it transpired that the 3 motions were related as they arose from the same decision; namely the Ruling delivered by Nderitu, J on December 7, 2022 whereupon the respective counsel for the parties applied for consolidation of the same.
6. The Vice Chancellor Egerton University became the 1<sup>st</sup> applicant. The Council Egerton University became the 2<sup>nd</sup> applicant whilst Egerton University became the 3<sup>rd</sup> applicant. The Universities Academic Staff Union, Egerton University Chapter became the respondent.
7. Mr. Ndubi alongside Mr. Konosi appeared for the 1<sup>st</sup> applicant whilst Mr. Erick Wamalwa appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> applicants. Mr. Lawrence Karanja on the other hand appeared for the respondent. Counsel further agreed to start with Civil Application E155 of 2022 and further orally highlighted their written submissions in Court with Mr. Ndubi intimating to Court that he had not filed written submissions in respect of Civil Application No. 's E002 of 2023 and E102 of 2022 as he was supporting those applications. Mr. Karanja also informed the Court that he had not filed written submissions in respect of Civil Application No. E102 of 2022, since the respondent was one.
8. The brief facts in Civil Application No. E155 of 2022, which the parties agreed to start with, is that on November 8, 2021, the respondent herein gave Egerton University a 7 days' strike notice and on November 15, 2021, called a strike for reasons inter alia that the University had failed to honour a return to work formula dated November 30, 2020.
9. The parties thereafter negotiated the matter and signed a return to work formula on March 4, 2022, which was recorded as an order of consent by the ELRC Court on March 29, 2022.
10. On March 17, 2022, the respondent filed a claim in the ELRC Court seeking several prayers and temporary reliefs pending the hearing of the main Cause which matter was placed before Wasilwa J who certified the same as urgent and subsequently fixed the application for hearing on May 24, 2022.
11. When the matter came up for mention before Nderitu, J on May 30, 2022 and despite the same not being cause listed, the Court heard the application and granted some interim orders in absence of counsel for the applicants.
12. Vide an application dated June 2, 2022, the applicants sought to set aside the orders issued on May 30, 2022. Subsequently thereafter on June 13, 2022, the respondent filed an application seeking to cite the applicants for contempt of Court and vide a ruling delivered on December 7, 2022, the ELRC Court delivered a ruling and found the applicants guilty of contempt.
13. On December 8, 2022, the ELRC Court fined the 1<sup>st</sup> applicant and members of the 2<sup>nd</sup> applicant each Kshs 100,000.00 or in default to serve one month's imprisonment and further on December 15, 2022, the Court inter alia ruled that they would have no audience before it unless and until they purged the contempt. It is this ruling and orders that have provoked the motions that are now before us.
14. It was submitted for the applicants that the judge erred in holding that the applicants had jointly, severally and individually deliberately failed and/or refused to obey the Court order dated May 30, 2022 and that they had not given any reasonable or plausible explanation for the same.
15. Regarding the nugatory aspect, it was submitted that if the proceedings in the ELRC Court were not stayed, the Court would proceed to hear and determine the Cause in the absence of the applicants, rendering the appeal herein an academic exercise and that further the applicants risk being imprisoned if the proceedings were not stayed and that the 3<sup>rd</sup> applicant being a public university funded by public



- money, it was important that the applicants be heard as to demonstrate that they had not willfully disobeyed the orders issued by the Court which was due to lack of finances.
16. On the other hand, it was submitted for the respondent that instead of the applicants doing everything in their power to ensure that that the orders made in Court on May 30, 2022 were satisfied, the applicants were focusing on delaying the execution by placing another application before this Court and that this was not the first time that the applicants had failed to comply with Court orders.
  17. On the nugatory aspect, it was submitted that staying of proceedings will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or where there was clearly no cause of action in law or equity which was not the case in the present case. Consequently, we were urged to dismiss the motions.
  18. Regarding Civil Application No.'s E102 of 2022 and E002 of 2023, and as we had alluded to earlier, we note that the applicants and the respondent are the same and the same relate to the same orders issued by Nderitu, J. on December 7, 2022. We will therefore not rehash the submissions therein.
  19. We have carefully considered the motions, the grounds thereof, the supporting affidavit, the rival submissions by the parties, the cited authorities and the law.
  20. The applicants motion is brought inter alia under Rule (5)(2)b. of this Court. Rule 5 (2) (b) of this [Court's Rules](#) which guide the Court in applications of these nature provides:
    - “(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:
      - (a) ...
      - (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.” (Emphasis ours).
  21. The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay of execution/proceedings or injunctions are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles were summarized by this Court in the case of [Stanley Kangethe Kinyanjui v Tony Ketter & Others](#) [2013] eKLR.
  22. We have carefully perused the memorandum of appeal that has been annexed to the motion and from a cursory perusal of the same, we are satisfied that the applicants have demonstrated that they have an arguable appeal worthy of consideration by this Court for reasons inter alia; whether the learned judge erred in punishing the applicants based on ex-parte interim orders issued on a mention date when the matter was not cause listed, whether contempt was proved to the required standard and whether the applicants had willfully and deliberately disobeyed the impugned orders.
  23. Of course we are mindful of the fact that we can say no more at this stage regarding arguability of the intended appeal lest we embarrass the bench that may eventually be seized of the intended appeal. Be that as it may, we are satisfied that the applicants have shown to the satisfaction of this Court that they have an arguable appeal.



24. On the nugatory aspect, the applicants have already been sentenced to 1 month in prison or in default fined a fine of Kshs 100,000.00 and in the likely event that they are sent to prison, they will have lost their right to liberty which in our view they cannot be compensated by way of damages and further their right to a fair hearing will have been grossly stifled as the ELRC Court has already ordered that they will have no further audience with the Court until and unless they purge the contempt. Consequently, we are satisfied that the applicants have established and satisfied the twin principles for our consideration in exercise of our discretion to grant an order of stay of execution as laid out in the Stanley Kangethe case (supra).
25. The applicants have further sought stay of further proceedings in Nakuru Employment and Labour Relations Court Cause No. E016 of 2022 pending the hearing and determination of this appeal. We are alive to the fact that stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impedes the right to expeditious trial. It is a discretionary power exercisable by the Court upon consideration of the facts and circumstances of each case. See *David Morton Silverstein v Atsango Chesoni* (2002) eKLR: - where this Court stated thus:
- “The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court’s own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay”.
26. In the instant case, the ELRC Court has already ordered that the applicants will have no further audience with the Court until and unless they purge the contempt and this order in essence therefore will have the effect of denying the applicants access to justice and the right to be heard which will be contrary to the canons and the principles of natural justice and if the proceedings in the ELRC Court are allowed to continue, the applicants intended appeal will be rendered nugatory and a mere academic exercise.
27. From the circumstances of this case therefore, we are satisfied that this is a proper case to grant stay of proceedings.
28. In view of the above we find merit in the applicants’ motion dated January 3, 2023 and we accordingly allow the same in the following terms:
1. An order of stay of proceedings is hereby issued staying further proceedings in Nakuru ELRC Cause No. E016 of 2022 pending the hearing and determination of this appeal.
  2. An order of stay of execution is hereby issued staying execution of the Ruling and Orders issued by Nderitu J in ELRC Cause No. E016 of 2022 on December 7, 2022 to the extent that the applicants will have no right of audience unless and until they have purged the contempt.
  3. Given the nature and circumstances of this case, we order and direct that this appeal be heard on a priority basis.
  4. The costs of this motion shall abide the outcome of the intended appeal”.



29. For the avoidance of doubt and since this application is related to Civil Application No.'s E102 of 2022 and E002 of 2023, we order that the orders issued in this application shall apply mutatis mutandis to Civil Application No.'s E102 of 2022 and E002 of 2023.

It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 30<sup>TH</sup> DAY OF JUNE, 2023.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

