



**Director General, National Employment Authority v Al Hujura Agency Limited
(Civil Application E185 of 2021) [2023] KECA 957 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 957 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E185 OF 2021
DK MUSINGA, A ALI-ARONI & JM MATIVO, JJA
JULY 28, 2023**

BETWEEN

**DIRECTOR GENERAL, NATIONAL EMPLOYMENT
AUTHORITY APPLICANT**

AND

AL HUJURA AGENCY LIMITED RESPONDENT

(Being an application for stay of execution and/or conservatory orders pending the lodging, hearing and determination of the intended appeal against the Ruling of the Employment & Labour Relations Court (Rika, J.) delivered on 28th May 2021 in ELRC APPEAL NO. 21 OF 2019.)

RULING

1. Before this Court is a Notice of Motion dated June 7, 2021 which is brought by the applicant pursuant to the provisions of Articles 22, 23, 156 (4) (6), 159(2), 164 (3) of the Constitution of Kenya, 2010, sections 3, 3A & 3B of the Appellate Jurisdiction Act and rule 5 (2)(b) of the Rules of this Court. The applicant seeks stay of execution and/or conservatory orders of the ruling of the Employment & Labour Relations Court (Rika, J.) delivered on May 28, 2021 in ELRC Appeal No 21 of 2019 pending the lodging, hearing and determination of an intended appeal.
2. The background of this application is that the respondent, a duly registered employment agency, was denied renewal of its certificate of registration by the applicant. It approached the Employment and Labour Relations Court (ELRC) by way of an appeal, to wit, ELRC Appeal No 21 of 2019, challenging the applicant's declinature to renew its registration certificate. The appeal was brought pursuant to the provisions of section 56(8) of the Labour Institutions Act.
3. The trial court (Ongaya, J) vide judgment dated May 29, 2020 allowed the appeal. The court declared that the respondent had complied with the statutory requirements for renewal or issuance



- of a registration certificate as an employment agency, and compelled the applicant to renew the respondent's registration certificate.
4. The respondent's registration certificate was not renewed as ordered by the trial court, necessitating the filing of an application dated 3rd August 2020 through which the respondent sought, inter alia, orders for the applicant to be cited for contempt of court.
 5. The court (Rika, J.) *vide* a ruling delivered on May 28, 2021 held the applicant to be in contempt of the court's judgment and decree dated May 29, 2020 for her decision not to renew the respondent's certificate as an employment agency and ordered that the applicant personally attends court for mitigation and sentencing on a date to be fixed by the Deputy Registrar.
 6. Dissatisfied with that decision, the applicant filed a notice of appeal, evincing her intention to appeal against it.
 7. It is contended in the motion and in the affidavit in support sworn by Edith Okoki, the Director General, National Employment Authority, that pursuant to the provisions of section 56 of the [Labour Institutions Act](#), all applications for registration of employment agencies and/or renewal of certificates be made to the Director General of the National Employment Authority, and that the applications be vetted by the Inter-Ministerial Committee established under section 54A of the [Labour Institutions Act](#). The membership of the Inter-Ministerial Committee comprises of the Ministry responsible for Immigration; Ministry responsible for Labour; Ministry responsible for National Security; Ministry responsible for Foreign Affairs; the Hon. Attorney General; the National Intelligence Service; the Directorate of Criminal Investigations; and the National Police Service. According to the applicant, the decision whether or not to issue and/or renew the respondent's certificate of registration does not lie solely with her. The ensuing position is that the applicant must get approval from members of the Inter-Ministerial Committee before renewing the respondent's certificate of registration.
 8. The grounds on arguability as enumerated in the applicant's draft Memorandum of Appeal which is annexed to the affidavit in support of the application are, inter alia, that the learned judge erred in law and fact by compelling the applicant to renew the respondent's certificate of registration; by determining that the power to issue and/or renew the respondent's certificate of registration solely lay with the applicant instead of the Inter-Ministerial Committee established by section 54A of the [Labour Institutions Act](#); by declaring that the respondent was compliant with the statutory requirements for renewal of a registration certificate as an employment agency when in fact the respondent was not; by defining registration as only applying to new applications whereas according to the provisions of section 2 of the [Labour Institutions \(Private Employment Agencies\) Regulations, 2016](#) it applies to both new applications and renewals and thus both are subject to vetting by the Inter-Ministerial Committee; by not considering that the applicant herein lacks authority to renew certificates of registration devoid of approval from the Inter-Ministerial Committee.
 9. On the nugatory aspect, it is contended that unless the orders of stay are granted, the applicant's intended appeal will be rendered nugatory in that her right of appeal will essentially have been taken away and therefore limiting and/or curtailing her constitutional right to fair hearing as provided for under Article 50 of the [Constitution](#); and that considering the potential irreversible consequences if the applicant is sentenced on a date to be scheduled by the Deputy Registrar of the trial court, the applicant would have been hindered in discharging her constitutional mandate of ensuring that the operations of the National Employment Authority are not interfered with.
 10. The application is opposed by the respondent by way of a replying affidavit sworn by Susan Wanjohi, its director. She depones from the onset that the application is a non-starter; lacks merit; and is a trojan horse designed to delay and embarrass the course of justice. She contends that the applicant has never



appealed against the judgment of the trial court directing her to renew the respondent's certificate of registration, nor has she sought stay of execution of the said judgment. The same position applies to the ruling on contempt of court delivered on May 28, 2021 which the applicant is yet to appeal against. According to the respondent, the delay by the applicant in lodging the intended appeal is tantamount to abuse of the court process. It is further contended that the applicant's draft memorandum of appeal is replete with issues of fact as opposed to issues of law which is a requirement in a second appeal. The grounds of appeal are said to be hopeless and without any chances of success whatsoever. We were urged to dismiss the application with costs.

11. At the hearing of this application, Ms Oyugi, Principal State Counsel appeared for the applicant. There was no appearance on behalf of the respondent despite service with the hearing notice. Ms Oyugi sought to rely on her client's written submissions without any oral highlights.
12. The applicant's written submissions dated June 22, 2021 are a reiteration of the grounds set out in the motion and in the affidavit in support, which have been set out hereinabove. It is contended that the applicant has satisfied the twin test for grant of the orders sought as set out in *Stanley Kinyanjui Kangethe vs Tony Ketter & Others* [2013] eKLR. It is further contended that there is great public interest to be served by issuing the orders sought. Our attention is drawn to the Supreme Court decision of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR and the decision of this Court in *Attorney General v Okiya Omtata Okiiti & Another* [2019] eKLR where stay orders were granted in the public interest.
13. The respondent's written submissions dated June 28, 2021 are a regurgitation of the averments contained in the replying affidavit. We are urged to find that the applicant has not satisfied the twin test for grant of the orders sought.
14. We have considered the application, the written submissions by the parties and the applicable law. It is trite law that in an application of this nature an applicant must demonstrate that the appeal or intended appeal is arguable, which is to say that the same is not frivolous. The applicant must also show that the appeal would be rendered nugatory if the orders sought are not granted. See *Stanley Kinyanjui Kangethe vs Tony Ketter & Others (supra)*. In determining whether the intended appeal is arguable or not, we are cognizant of the fact that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. See the case of *Joseph Gitabi 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 trial court is faulted for not appreciating and/or making wrong interpretations of the provisions of section 54A and 56 of the *Labour Institutions Act*. The same argument is made in respect of the provisions of section 2 and section 6 of the *Labour Institutions (Private Employment Agencies) Regulations*, 2016. The question whether the applicant has the sole jurisdiction to issue renewal of the respondent's certificate of registration or whether that is a shared responsibility with the Inter-Ministerial Committee is not an idle argument. The same position obtains in respect of the argument that the application by the respondent was time barred by dint of the provisions of section 6 of the *Labour Institutions (Private Employment Agencies) Regulations*, 2016. Whether the trial court made correct findings as far as these provisions of the law are concerned can only be interrogated at an appeal stage. We are therefore satisfied that the applicant has demonstrated that her 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. On nugatory aspect, we are mindful that 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 *Stanley Kinyanjui Kangethe v Tony Ketter & Others* (*supra*).
17. It is contended, inter alia, that if the applicant is sentenced by the trial court, the operations of the National Employment Authority will be greatly prejudiced. The applicant is, pursuant to the provisions of section 17(6) of the *National Employment Authority Act*, 2016 responsible for the day-to- day management of the Authority; and in consultation with the Board, responsible for the direction of the affairs and transactions of the Authority, the exercise, discharge and performance of its objectives, functions and duties, and the general administration of the Authority. If the applicant is sentenced to imprisonment, the operations of the Authority will be prejudiced. The consequences of such a sentence may be irreversible not only to the Authority but to the general populace. There is, undoubtedly, great public interest to be served in allowing this application.
18. We are therefore satisfied that the applicant has satisfied both limbs for grant of relief under rule 5(2) (b) of the *Court Rules*. Accordingly, the Notice of Motion dated June 7, 2021 is hereby allowed. We direct that the costs of this application be in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY JULY, 2023.

D. K. MUSINGA, (P.)

.....

JUDGE OF APPEAL

ALI - ARONI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

