



**Teachers Service Commission v Adhiambo & another (Civil Application
193 of 2017) [2023] KECA 1173 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1173 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 193 OF 2017
HA OMONDI, JM MATIVO & GWN MACHARIA, JJA
OCTOBER 6, 2023**

BETWEEN

TEACHERS SERVICE COMMISSION APPLICANT

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

JANE CONSOLOTA ADHIAMBO 2ND RESPONDENT

(Being an application for stay of execution of the Judgment and Orders of the ELRC Court at Nairobi (M. N. Nduma, J.) delivered on 21st July 2017 in ELRC Cause No. 459 of 2014)

RULING

1. The application before us is dated August 17, 2017 brought pursuant to section 3A of the *Appellate Jurisdiction Act* and rules 5(2) (b), 41, 42, 47 and 75 of the *Court of Appeal Rules*, seeking stay of execution of the Judgment and orders of the Employment and Labour Relations Court (ELRC) (Nduma, J.) delivered on July 21, 2017 in ELRC Cause No.459 of 2014 pending the hearing and determination of the appeal.
2. The background to the application is that, 1st respondent filed a memorandum of claim dated March 21, 2014 seeking damages for wrongful and unfair dismissal. It was her contention that she was employed by the applicant on May 1, 1989 as a P1 teacher based in Homabay County. On August 22, 1999, she applied for personal unpaid leave for 2 years to commence from January 2000 to which the applicant responded that no such leave existed and that her resignation was accepted subject to clearance. She denied having resigned but the applicant was adamant that she had. She then wrote a letter seeking reinstatement and was advised to apply for her position afresh. She was interdicted through a letter dated January 6, 2012 for deserting duty from January 3, 2000 to allow TSC to investigate the matter, and was later dismissed vide a letter dated September 20, 2012 for deserting duty while a teacher at Wiobiero Primary School.



3. The applicant opposed the claim, averring that the 1st respondent left her work station with effect from 1st March 2000 before getting proper communication from TSC and without formal approval or authority. According to the applicant, the 1st respondent was given an opportunity to explain her case during the disciplinary hearing where she admitted deserting duty and was thus dismissed from service.
4. The trial court in its judgment held that the applicant purported to terminate the 1st respondent without any justification and without following any fair procedure; that the purported interdiction and disciplinary hearing proceedings were a sham and a nullity; and that the salary paid to her even after unlawful and unfair termination was lawfully due to her. It further held that the applicant was not entitled to a refund of the salary paid to the 1st respondent; and that the 1st respondent was entitled to salary arrears from January 1, 2000 to September 20, 2012 at Kshs.10,216/- per month totaling to Kshs.1,471,104/- less salary paid to her together with interests at court rates from the date of dismissal, compensation for wrongful and unfair dismissal in damages equivalent to 12 months' salary amounting to Kshs.122,592/- together with interests at court rates from the date of judgment.
5. The applicant being aggrieved filed the instant application which is founded on the grounds on the face of it and the supporting affidavit sworn by Simeon Omare, Senior Deputy Director in charge of human resource and development at TSC. He avers that the trial court's award was manifestly excessive as it is over and beyond the maximum compensation set by the *Employment Act*, and the amount has placed exceptional hardship on it; that it has an arguable appeal with high chances of success; and that if the judgment is not stayed, the appeal shall be rendered nugatory and the applicant shall suffer irreparable loss as the 1st respondent may not be able to refund the decretal sum.
6. The applicant annexed its draft memorandum of appeal and the grounds of contention are: that the learned Judge erred in awarding maximum compensation without justification and contrary to section 49(1) (c) of the *Employment Act*; that the learned Judge failed to take into account that the respondent was subjected to a fair disciplinary process; and that the learned Judge erred in ordering for payment of salary arrears when the 1st respondent had not rendered any services.
7. The matter came up for hearing before us on the 16th May 2023 when learned counsel Mr. Langat holding brief for Mr. Mulaku appeared for the appellant/applicant and learned counsel Mr. Kanyangi appeared for the 1st respondent.
8. Both counsels wished to fully to rely on their respective filed submissions. However, as at the time of writing this ruling, only the applicant's submissions were uploaded in the judicial e-filing system.
9. The applicant's submissions are dated May 11, 2023, and they are a regurgitation of the grounds upon which the application is premised, and we therefore shall not recall them. We however emphasize that the applicant urged that the 1st respondent is assured of the fruits of her judgment in the event that the appeal is not successful, as the appellant is a government institution with perpetual succession, and that it is in the interest of justice that the application be allowed.
10. We have accordingly considered the application, the supporting affidavit, the replying affidavit as well as the applicant's submissions. The principles that guide this Court in determining an application under rule 5(2) (b) of this *Court's Rules* are well settled and have been well summarized in the case of *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.
11. We have perused the draft memorandum of appeal that is attached to the applicants' affidavit in support of the application. Looking at the intended grounds of appeal, we are not satisfied that



the appeal is arguable. The applicant's intended grounds of appeal mainly revolve around the compensation awarded to the 1st respondent that is allegedly contrary to section 49(1) (c) of the Employment Act.

12. At this stage, we cannot enunciate what the entire provision entails. However, it would have been prudent for the applicant to have read the entire section in full, or even better, the Act in full so as to accord it its respectful interpretation. Further, and with respect to the applicant, the disciplinary hearing proceedings were conducted 12 years after the fact. We need not say much on arguability at this stage, lest we embarrass the bench that shall eventually hear the appeal. All in all, as stated above, we are of the view that the appeal is not arguable.
13. In view of the foregoing, we find no useful purpose would be served by pronouncing ourselves on the second limb of the twin principle for grant of orders under rule 5(2) (b).
14. Accordingly, the applicant's Notice of Motion dated August 17, 2017 fails and is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

J. M. MATIVO

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

