



**Acting Chief Executive Officer Kenya Medical Supplies Authority & another v Simiyu  
(Civil Application E210 of 2021) [2023] KECA 1437 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1437 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E210 OF 2021  
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA  
NOVEMBER 24, 2023**

**BETWEEN**

**ACTING CHIEF EXECUTIVE OFFICER KENYA MEDICAL SUPPLIES  
AUTHORITY ..... 1<sup>ST</sup> APPLICANT**

**THE BOARD OF DIRECTORS KENYA MEDICAL SUPPLIES  
AUTHORITY ..... 2<sup>ND</sup> APPLICANT**

**AND**

**FREDRICK WANYONYI SIMIYU ..... RESPONDENT**

*(An application for stay of execution and stay of further proceedings of the  
Ruling and Orders of the Employment and Labour Relations Court at Nairobi  
(Nduma Nderi, J.) delivered on 31st May 2021 in Nairobi ELRC No. E466 of 2020)*

**RULING**

1. The applicants' Notice of Motion dated 21<sup>st</sup> June 2021 is brought pursuant to rules 1(2) and 5(2) (b) of the [Court of Appeal Rules, 2010](#), articles 159 and 164(3) of the [Constitution](#), as well as sections 3A and 3B of the [Appellate Jurisdiction Act](#), seeking: i) an order of stay of the ruling and orders of the Employment and Labour Relations Court in ELRC No. E466 of 2020, pending the inter parties hearing hereof and final disposal of this application; ii) stay of the ruling and orders of the Employment and Labour Relations Court, and stay of the proceedings in ELRC No. E466 of 2020 pending the hearing and determination of the appeal.
2. The applicant's motion is brought on the grounds set out on its face, which are that the respondent, was working for Kenya Medical Supplies Authority (KEMSA) as the Director of Legal Affairs /Corporate Secretary until August 25, 2020 when he was interdicted for failure to properly advise the management and Board on award of contracts, and for divulging information to unauthorized persons by leaking KEMSA reports, documents and communications. Dissatisfied with the interdiction, the respondent



filed a claim against KEMSA in the Employment and Labour Relations Court. Simultaneously with the suit, he applied for an injunction seeking the following orders;

- a) Pending the inter parties hearing and determination of this application, this court be pleased to issue a temporary injunction restraining the applicant from proceeding with any further disciplinary proceedings against the respondent based on reasons as contained in the letter dated August 25, 2020.
  - b) Pending the substantive hearing and determination of this appeal, this Court be pleased to suspend the implementation of the decision contained in the applicant's letter dated August 25, 2020 interdicting the respondent.
  - c) Pending the substantive hearing and determination of this appeal, this court be pleased to issue a temporary injunction restraining the applicants from proceeding with any further disciplinary proceedings against the respondent based on reasons as contained in the letter dated August 25, 2020.
3. It was the applicants' case that, on August 31, 2020, the Employment and Labour Relations Court granted an interim injunction against the letter of interdiction of the respondent and, in its ruling of May 31, 2021, the court allowed the application. The applicants were aggrieved by the ruling and have preferred an appeal to this Court, where they contend that the appeal is arguable and raises serious and substantive matters of law and fact for determination.
  4. It was asserted further that the substratum of the appeal lies in the integrity and sanctity of the internal investigative procedures of KEMSA established within the timelines set out in the KEMSA Human Resource and Administration Policies and Procedures Manual, and that the respondent will not suffer any loss if the investigations are allowed to be conducted as envisaged under the Policies and Procedures Manual; that the respondent will be entitled by law to half of his salary and that, upon being cleared, he will be entitled to payment of the withheld salary. It was further contended that the appeal has high chances of success, and that it will be rendered nugatory if the orders sought are not granted.
  5. The motion was supported by the affidavit of Edward Njoroge, the Acting Chief Executive Officer of KEMSA, in which, to a large extent, he reiterated the grounds set out in the motions. Annexed to the motion was a copy of the Notice of appeal and a draft Memorandum of Appeal that raised several grounds of appeal, substantive of which was that, the learned judge was wrong in finding that the interdiction was indefinite and open-ended at the interim stage despite the KEMSA Human Resource and Administration Policies and Procedures Manual at paragraph 21.11 expressly providing that an interdiction should not go beyond 3 months; in disregarding the express provisions of the KEMSA Human Resource and Administration Policies and Procedures Manual by determining the merits of the case at this early stage, and without hearing and considering the evidence; and in imputing that the applicants ought not to have taken further steps, yet the respondent enjoyed a temporary order staying the interdiction pending the hearing and determination of the respondent's application dated August 30, 2020, amongst other grounds.
  6. The application was opposed by the respondent in a replying affidavit sworn on June 29, 2021, where it was deposed that; the application did not satisfy the two conditions necessary for a stay of execution and proceedings under rule 5(2) (b) of the [Rules of this Court](#); that the grounds set out in the memorandum of appeal are not arguable so as to warrant the grant of such order; that the learned judge merely observed that the letter of interdiction did not indicate the period of interdiction, and did not make any reference to the KEMSA Human Resources and Administration Policies and Procedures Manual; that the temporary order of stay of his interdiction of August 31, 2020, did not prevent the applicants from undertaking further investigations into the allegations against the respondent with the help of



- other government agencies; and that, in totality, the grounds set out in the applicants' memorandum of appeal are not arguable since the learned judge rightly concluded that the respondent was wrongly interdicted. Furthermore, the applicants have not demonstrated how the appeal will be rendered nugatory if the orders of stay are not granted; that no harm, loss or prejudice have been demonstrated by the applicant if the appeal was to proceed with the orders of the trial judge remaining in situ.
7. In their submissions dated June 29, 2021, learned counsel for the applicants Ms Ong'anda & Associates reiterated the grounds of the application on the nugatory aspect, submitting that the KEMSA Human Resource and Administration Policies and Procedures Manual at paragraph 21.17 and 21. 10 allow for investigations in cases that may lead to dismissal; that the integrity of the investigations are at risk of gross interference by the respondent, who is the Director Legal/Corporation Secretary. The cases of *Energy Regulatory Commission v John Sigura Otido* [2019] eKLR and *Vicky Kemunto Ocharo v Independent Policing Oversight Authority* [2018] eKLR were relied on to support the proposition that investigations into impropriety could be compromised if the incumbent remained in office, which could render the appeal nugatory.
  8. In their submissions, counsel for the respondent Ms. Brian Khaemba, Kamau & Co. Advocates submitted on the nugatory aspect, arguing that the applicants have not demonstrated how the appeal will be rendered nugatory if the orders of stay are not granted; that the ruling and orders of the trial court did not in any way affect the integrity and sanctity of the internal investigative procedures of KEMSA and that, therefore, denial of the stay orders would not have any impact on the investigative procedures, if any; that the respondent cannot in any way prejudice the integrity of the investigative process and that, in any event, the letter of interdiction made no reference to the pendency of any investigations. See the decision in the case of *Katangi Developers Limited v Prafula Enterprises Limited & another* [2018] eKLR.
  9. The principles that guide this Court in determination of an application under rule 5(2) (b) of this *Court's Rules* are well settled. These principles have been well summarised in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR to wit; 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.
  10. In determining whether the intended appeal is arguable or not, it is observed that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. See *Joseph Gitabi Gachau & another v 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 *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No nai 345 of 2004
  11. As to whether the appeal is arguable, the memorandum of appeal discloses that the applicants seek to have this Court find that the learned Judge was wrong in finding that the interdiction was indefinite and open- ended at the interim stage despite the KEMSA Human Resource and Administration Policies and Procedures Manual at paragraph 21.11 that expressly provides that an interdiction should not go beyond 3 months, and whether the Court disregarded the express provisions of the KEMSA Human Resource and Administration Policies and Procedures Manual. As to whether or not the learned Judge wrongly construed the provisions of the KEMSA Human Resource and Administration Policies and Procedures Manual would in our view render the appeal arguable.
  12. Concerning whether the appeal will be rendered nugatory, the applicants are apprehensive that, if stay is not granted, the integrity of the investigations are at risk of gross interference by the respondent by virtue of his position as the Director Legal/Corporation Secretary.



13. In the case of *Stanely Kang'etbe Kinyanjui v Tony Ketter & 5 others* (*supra*), this court stated that:

“x) 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.”

14. The ruling of the High Court resulted in the reinstatement of the respondent to his position of the Director of Legal Affairs /Corporation Secretary. However, consideration of the applicants’ concerns does not show whether the investigative processes were ongoing, or how the respondent was likely to interfere with the integrity and sanctity of the internal investigative procedures of KEMSA so as to render the appeal nugatory.

15. In sum, and as the applicants have only been able to satisfy the two limbs required in the applications brought under rule 5(2) (b) of the rules of this court, and since the requirement is that both limbs be satisfied, the application dated June 21, 2021 is unmerited and, as such, fails and is hereby dismissed.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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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*

**DEPUTY REGISTRAR**

