



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Ports Authority v Muhanji (Civil Application E091 of 2023)
[2023] KECA 1396 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1396 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E091 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
NOVEMBER 24, 2023**

BETWEEN

KENYA PORTS AUTHORITY APPLICANT

AND

ANTHONY MUHANJI RESPONDENT

*(An Appeal from the Judgment of the Employment and Labour Relations
Court at Mombasa (Agnes Kitiku Nzei, J.) delivered on 19th June
2023 in Employment & Labour Relations Court Case No.98B of 2021)*

RULING

1. By its application dated 26th September 2023, the applicant, Kenya Ports Authority, seeks an order of stay of further proceedings and stay of execution of the Decree and Judgment delivered on 19th June 2023 by Hon Lady Justice Nzei, J. in Mombasa Employment and Labour Relations Court Case no 98B of 2021 pending hearing and determination of the Applicant's intended appeal.
2. The genesis of the decision intended to be appealed against was a claim filed by the respondent before the Employment and Labour Relations Court at Mombasa in Cause no 98B of 2021. According to the respondent, he was employed by the applicant as a Sub-Overseer, Grade HG2 and rose in the ranks, eventually achieving the position of Senior Works Officer Port C/no 87798, Grade HM2 IN 2016. However, on 19th March, 2021, the applicant issued him, the respondent, with a letter of redeployment/re-designation to the post of Senior Architect Post no 830-3002. According to the respondent, the redeployment was arbitrary and un-procedural. Barely a week into his deployment, the applicant issued him with a show cause letter why disciplinary proceedings could not be instituted against him over allegations that he was amongst the applicant's engineers who had issued certificates that led to overpayments relating to the construction of concrete barriers to Ezgo Limited, Grand Logistics ltd, Salwa ltd and Haafah East Africa ltd. In response to the show cause letter, the respondent denied the accusations against him and explained his version of the facts. According to the respondent,



notwithstanding his explanation, the applicant went ahead and issued him with a summary dismissal letter dated 23rd June 2021 stating the reason as:

“you issued certificates that led to the overpayments of contractors in the concrete barriers and Makongeni Works cases.”

3. According to the respondent, the Directorate of Criminal Investigations undertook thorough investigations into the said allegations and absolved him of blame. The respondent's case, therefore, was that it was malicious and unjustified for the respondent to have condemned him over a matter in which he had been exonerated by the said Directorate. It was further contended that the applicant's Board of Directors that effected the summary dismissal had no such powers. He therefore sought a declaration that his summary dismissal was unfair, malicious, wrongful and illegal; a declaration that his deployment was malicious, unlawful and devoid of proper procedure; a declaration that the applicant's Board of Directors lacked the power to summarily dismiss him, and hence his dismissal was null and void; an order reinstating the respondent to his former position of Senior Works Officer Port C/no 87798 Grade HM2 without any loss of benefit; general damages; and costs of the suit.
4. In its response, the applicant denied the claim and asserted that the respondent was rightly and properly dismissed, and was not entitled to the reliefs sought.
5. After hearing the parties, the learned Judge found that the applicant's act of purporting to re-deploy and to re-designate the respondent from the post of Senior Works Officer (Maintenance Port) to the post of Senior Architect was unfair, unlawful and unjustified, and had no force of law; that the respondent's dismissal was not shown to have been anchored on any valid reason; that the procedure adopted by the applicant in dismissing the respondent was unfair; and that the Board that purported to dismiss the respondent had no power to do so. The learned Judge proceeded to direct the applicant to reinstate the respondent to his former position of Senior Works Officer Grade HM2 forthwith, without any loss of benefits and to treat the respondent in all respects as if his employment had not been terminated. The learned Judge also awarded the respondent the costs of the suit plus interest at court rates.
6. It is that decision that provoked the lodging of the Notice of Appeal by the applicant dated 27th June 2023.
7. The Motion was supported by the affidavit of Stephen Kyandih, the applicant's Principal Legal Officer, sworn on even date, and in which the deponent set out the facts leading to the decision and averred that the respondent filed an application for contempt of court dated 12th September 2023 against the applicant and its five Directors who are yet to be served with the application personally; that the Intended Appeal is not only arguable but has very high chances of success based on the attached Draft Memorandum of Appeal; that the orders made were in vain and incapable of being complied with since there was clear evidence to show that the position was no longer in existence, given the organisational changes in the respondent's structure; that, although the applicant filed an application for stay before the trial court and urged the court to hear the said application in priority to the application for contempt, the learned Judge took a dismissive attitude to his submissions and directed that the contempt application be heard on priority basis, and that the Directors appear virtually in court on 19th June 2023; that in the circumstances, the learned Judge has a pre-disposed mind regarding the contempt application's outcome since she completely ignored the fact that the Director had a right to be heard in response to the application upon being served personally as per the law; and that it is the conduct of the court that caused it to consider withdrawing its stay of execution application before the trial Court and file the instant application.



8. It was averred that the Applicant stands to suffer substantial and irreparable harm if the orders of stay of execution and proceedings are not issued, given that the superior court orders are incapable of being affected, and that they were made in vain; that reinstatement of the respondent to a non-existent position is tantamount to managing the affairs of the applicant by compelling the creation of a redundant position contrary to the provisions of the *Kenya Ports Authority Act*; that the applicant is not aware of the respondent's means and assets, or whether he capable of refunding the terminal dues in the event that the appeal succeeds; that the respondent stands to suffer no prejudice if the application is allowed; that the applicant is prepared to comply with any conditions set by this Court for the sake of the Intended appeal being heard on merit before the trial court's orders are enforced; and that it is in the interest of justice that stay of execution and further proceedings is granted.
9. In response to the application, the respondent relied on the replying affidavit sworn by Edna Brandy Wanja, the respondent's counsel, sworn on 9th October 2023.
10. According to the deponent, there was no evidence tabled by the applicant in support of the allegation that the position to which the respondent sought reinstatement before the trial court no longer exists; that, even if that position no longer exists, the respondent should be reinstated to a position equivalent to his former position, provided that there is no loss of benefit; that the respondent has never been served with the alleged Notice of Appeal, and that there is no evidence that payment was made for the said Notice of Appeal; that, by withdrawing its application for stay before the trial Court and filing the instant application, the applicant was forum-shopping; that the intended appeal has no merit since the trial court found that the respondent's termination was unfair; and that there were special circumstances warranting an order for reinstatement.
11. We heard this application on the court's virtual platform on 9th October 2023 during which learned counsel, mr Khagram, appeared for the applicant while ms Wanja appeared for the respondent. As none of the counsel complied with the directions given by the Deputy Registrar, we directed them to address us on the application orally.
12. In his submissions, mr Khagram urged us to find that the applicant had established that its intended appeal is arguable. According to him, the order reinstating the respondent to his former position, which was non-existent, was incapable of being complied with and that, if the order was to be executed, it would render the intended appeal nugatory. It was learned counsel's submissions that reinstatement is only ordered in exceptional circumstances. He cited the case of *Kenya Airways Limited v Aviation & Allied Workers Union & 3 Others* [2014] eKLR. It was submitted that the execution of the said order would amount to the court interfering with the applicant's management structure. According to learned counsel, prior to his dismissal, the respondent had been moved to another position. On the issue as to whether the appeal, if successful, will be rendered nugatory absent stay of execution and proceedings, mr Khagram referred us to the contents of the supporting affidavit, and submitted that contempt of court proceedings have been commenced against the applicant's directors, who were never served with the court order.
13. On her part, ms Wanja likewise referred to the contents of the replying affidavit and submitted that there were exceptional circumstances meriting the issuance of an order for reinstatement. She urged us to find that the decision of the trial court was merited as the termination was flawed. On the nugatory aspect, we were urged to consider the fact that the respondent had worked for the applicant for 15 years, and that his dismissal was likely to destabilise him as he had a young family. However, when asked by this Court whether the issue of reinstatement was not arguable, ms Wanja conceded that that issue was arguable, but contended that the appeal would not be rendered nugatory.



14. We have considered the application, the affidavits both in support of and in opposition to the application, and the oral submissions made.
15. Before dealing with the merits of the application, ms Wanja urged us to find that there is no Notice of Appeal. It is now trite that our jurisdiction emanates from the filing of the Notice of Appeal or the Appeal. This comes out clearly from rule 5(2) (b) of the Rules of this Court, which provides that:
 - (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 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.
16. The import of this rule was appreciated by this Court in National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR where the Court expressed itself as hereunder:

“The applicant filed its notice of appeal against the said decision as the Court has repeatedly pointed out Rule 5 (2) (b) does not provide that " where a valid notice of appeal;" the Rule simply provides that:-

‘In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74. ’ Rule 74 itself does not talk about a valid notice of appeal. The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of Rule 80 under which a notice of appeal can be struck out. We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under Rule 5 (2) (b) is being considered.”
17. We associate ourselves with that opinion, and are of the view that to find otherwise may be unjust to a party who, due to failure by the trial court to notify it of the delivery of the judgement is thereby unable to lodge its Notice of Appeal timeously, yet cannot seek conservatory orders until its Notice of Appeal is regularised within time. We reiterate that whereas a Notice of Appeal is a prerequisite to the seizure of jurisdiction by this Court, the validity or otherwise of the Notice of Appeal ought to be dealt with in an application specifically challenging the Notice of Appeal.
18. We have on record a Notice of Appeal lodged by the applicant before the Employment and Labour Relations Court, and that is all we want to say on that issue.
19. There are two requirements that need to be met by the applicant herein so as to obtain the relief sought in this application. The first requirement is that the applicant needs to demonstrate that its intended appeal is arguable and, secondly, that the intended appeal, if successful, will be rendered nugatory if the order sought is not granted. See Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR.
20. We have considered the grounds of the intended appeal, particularly the allegation that the learned Judge failed to take into account the fact that orders of reinstatement are only granted in exceptional circumstances and that, in this case, the position to which the respondent was reinstated was no longer in existence in the applicant’s management structure. Ms Wanja conceded, and rightly so in our view, that this is an arguable issue. We are in this regard mindful that an arguable point is not necessarily one



that must succeed, but merely one that is deserving of consideration by the Court. In this regard, this Court held as follows in *Somak Travels Ltd v Gladys Aganyo* [2016] eKLR:

“It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this Court. While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application.”

See *Stanley Kang’ethe v Tony Keter & 5 others*[2013] eKLR.

21. The respondent has raised matters which, in their view, render the intended appeal unlikely to succeed. However, at this stage, the Court cannot make findings on the chances of success of the intended appeal. As this Court held in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR:

“It is to be remembered that in an application such as this the grounds are not to be argued; all an applicant is required to do is to point out to the Court the ground or grounds which he believes are arguable and leave it to the Court to decide on the issue of whether or not the matters raised are arguable.”

22. On the second limb of the twin principle as to whether the applicant’s appeal will be rendered nugatory if the orders sought are not granted and the appeal succeeds, we are guided by the decision in *Stanley Kangethe Kinyanjui v Tonny Keter & others* (*supra*) where the Court summarized the guiding principles as follows:

- i. “The term ‘nugatory’ has to be given its full meaning. It does only mean worthless, futile or invalid. It also means trifling.
- ii. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

23. The applicant’s contention that the respondent has commenced contempt of court proceedings against the applicant’s directors in order to compel them to obey the order of the trial court is not disputed. It is also not disputed that the trial court has prioritised the hearing of the contempt proceedings. The applicant’s position that it is unable to comply with the orders of reinstatement in light of the non-existence of the position to which the respondent was reinstated makes it more likely than not that the applicants’ directors may well be committed for contempt of court orders. If that were to happen, the intended appeal is likely to be rendered nugatory. In this regard, we are persuaded by the decision of this Court in *Double Clean Limited & 4 others v Jambo Holdings Ltd & 2 others* [2016] eKLR where this Court expressed itself as hereunder:

“In *Justus Kariuki Mate & another v Martin Nyaga Wambora & Another* [Civil Application no Nyeri 8 of 2011] (UR) [2014] eKLR, the Court stated, *inter alia*:

- ‘9. The power of guarding and protecting the authority and dignity of court orders although jealously guarded is also balanced with the prospect of an applicant being subjected to a punishment that may entail loss of his or her



liberty. Thus courts always allow the applicant an opportunity to state his or her case.’

And in *Ian Leslie Campbell & another v Canadian Hunger Foundation*, [Civil Application no Nai 56 of 1994 (NAI 28/940 UR) (UR), the Court had this to say:

‘As to whether the intended appeal if successful, will be rendered nugatory, that will undoubtedly be the consequence because if the applicants are committed to prison, they may serve out the jail terms before the intended appeal is heard and disposed of.’

Those remarks apply with equal force to the circumstances of the present motion. If we do not stay the contempt proceedings, the applicants and the said John Mugo Njeru will be sentenced and the sentence may very well be a prison term which term they may serve before the intended appeal is heard and disposed of. If that happens the intended appeal against those committal proceedings will only be of academic interest.”

24. We likewise find that, unless a stay of both execution and proceedings is granted, the intended appeal, should it succeed, is likely to be rendered nugatory. We have also considered the public interest involved and balancing the same as against the respondent’s interest, the order that commends itself to us, and which we hereby grant, is that there shall be a stay execution of execution of the judgment and decree of the Employment and Labour Relations Court at Mombasa given on 19th June 2023 in Case no 98B of 2021 as well as further proceedings in the said case pending hearing and determination of the intended appeal. The costs of this application will be in the intended appeal. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH 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. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR

