



Micro and Small Enterprises Authority (MSEA) v Kariithi (Civil Application E156 of 2021) [2023] KECA 1428 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KECA 1428 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E156 OF 2021
AK MURGOR, J MOHAMMED & S OLE KANTAI, JJA
NOVEMBER 24, 2023**

BETWEEN

MICRO AND SMALL ENTERPRISES AUTHORITY (MSEA) APPLICANT

AND

ANNE NYAMBURA KARIITHI RESPONDENT

(Being an application for an order of stay of execution against a Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Maureen Onyango, J.) dated 23rd April, 2021 in ELRC Petition No. 87 of 2020)

RULING

1. By Notice of Motion brought under rules 5 (2) (b) and 42 of the *Court of Appeal Rules* the applicant, Micro and Small Enterprises Authority prays in the Motion that we order a stay of execution against the respondent, Anne Nyambura Kariithi, from proceeding with execution of the Judgment/order issued on 23rd April, 2021 pending the hearing and determination of an intended appeal against a judgment delivered by the Employment and Labour Relations Court at Nairobi in Petition No. 87 of 2020. The history of the dispute in that court is captioned in grounds in support of the Motion and in an affidavit of Simon Nyamolo, Director, Corporate Services and Administration of the applicant in a replying affidavit by the respondent. In sum, the respondent was at the material time an employee of the applicant having been employed as Senior disciplinary case by the applicant against the respondent that led to her being interdicted; the respondent filed the said petition praying for a conservatory order restraining the applicant from continuing what she regarded to be an illegal and irregular disciplinary process; an order to bring into the court to quash an interdiction letter dated 8th June, 2020; an order to quash the said disciplinary action; a declaration that the disciplinary action was unconstitutional, null and void; there was a prayer for damages against other prayers. Accompanying the petition was a Motion where temporary relief was sought pending the hearing and determination of the petition. The petition and the application were heard together and were allowed in the Judgment delivered



on 23rd April, 2021 and the main feature of that Judgment for purposes of the Motion before us is that it was ordered that the respondent be reinstated to office immediately and unconditionally. It is argued for the applicant that complying with the Judgment by reinstating the respondent will disrupt the harmonious working environment in the applicant's office and that the intended appeal would be rendered nugatory because the respondent would have returned to work and would thus subvert the entire disciplinary process of the applicant.

2. The respondent, in the replying affidavit says, inter alia, that no reasons have been advanced to warrant a grant of the orders sought; that if we were to allow the application it should be conditional on the applicant being ordered to deposit money in a joint account and provision of security for costs.
3. Both parties filed written submissions which we have perused.
4. The Motion came for hearing on a virtual platform on 29th September, 2021 when we gave interim order of stay pending this formal ruling.
5. The principles that apply in an application of this nature are old hat. For an applicant to succeed he must firstly show that the appeal, or intended appeal, as the case may be, is arguable which is the same as saying that it is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay – See the case of *Trust Bank Limited & Another v Investech Bank Limited & 3 Others* [2000] eKLR where this Court expressed itself thus:

“The jurisdiction of the Court under Rule 5(2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case.”

6. It is also true that a single arguable point of appeal is sufficient as an applicant does not have to show a multiplicity of arguable points and an arguable point is not one that will succeed – See *Dennis Mogambi Mongare v Attorney General & 3 Others* [2012] eKLR.”
7. In the present case the trial court upon hearing the petition issued orders including an order that the respondent be reinstated to office immediately and unconditionally. It has been held by the court that the remedy of reinstatement is in the nature of specific performance and it is a remedy that should be granted only in exceptional circumstances where other remedy would not suffice. We find, on the facts before the trial court, that it is arguable in appeal whether that remedy should have been granted. It is argued for the applicant, on the nugatory aspect, that reinstating the respondent to office could disrupt the operations of its office. We agree. If the respondent is reinstated to office and the appeal succeeds it would defeat the purpose for which the appeal was taken.
8. We find, in the circumstances that the Motion satisfies both limbs in an application of this nature and the same succeeds and is allowed. Costs of the Motion will be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

A.K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED



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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

