



REPUBLIC OF KENYA



KENYA LAW
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Oyaro v Kenya Electricity Generating Company PLC (Kengen); National Council for Persons with Disability (Interested Party) (Civil Application E103 of 2023) [2023] KECA 1352 (KLR) (10 November 2023) (Ruling)

Neutral citation: [2023] KECA 1352 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E103 OF 2023
K M'NOTI, HA OMONDI & GWN MACHARIA, JJA
NOVEMBER 10, 2023**

BETWEEN

HENRY NYABTO OYARO APPELLANT

AND

**KENYA ELECTRICITY GENERATING COMPANY PLC
(Kengen) RESPONDENT**

AND

NATIONAL COUNCIL FOR PERSONS WITH DISABILITY INTERESTED PARTY

(Being an application for stay of execution of the of the Judgement and Order at the Employment and Labour Relations Court, Nairobi (M. Mbaru, J.), delivered on 27th February 2023 in ELRC Petition No. E203 of 2021)

RULING

1. The application before us is a notice of motion dated 27th February 2023, brought pursuant to articles 23 (3) (c), 159, 259 (1) and 260 of the *Constitution*, the inherent jurisdiction of the court, sections 3A (1) & (2) and 3B (1) of the *Appellate Jurisdiction Act*, rules 42, 43, and 47 of the *Court of Appeal Rules, 2010* and direction 3(f) (ii) of the *Court of Appeal Practice Directions- Civil Appeals and Applications, 2015*, seeking a conservatory order stopping any further/precipitate implementation of the respondent's notice of retirement dated February 9, 2021 addressed to the applicant and the respondent's decision in its letter dated October 4, 2021 addressed to the applicant, and/or any new communication or action/omission purporting to retire or retiring the applicant before attaining the retirement age of sixty-five (65), pending the hearing and determination of the applicant's appeal.



2. The genesis of the matter is that, the applicant filed a petition dated December 17, 2021 in the Employment and Labour Relations Court (ELRC) contending that he was born on November 2, 1962 and that he was due to retire at the age of sixty-five (65), on November 1, 2027 on account of his disability, instead of sixty years (60). He contended that the respondent issued him with a notice to retire dated February 9, 2021 which was to be effective on December 31, 2021; that on September 30, 2021, he wrote to the respondent informing it that he had undergone medical examinations, and had been certified as a person living with disability; that he consequently sought tax relief and that his retirement age be moved up to 65 years; and that the respondent, vide a letter dated October 4, 2021, accepted to allow him tax relief, but declined to move up his retirement age. He further contended that the respondent unlawfully and unconstitutionally, sought to retire him at the age of fifty-nine (59), as a result of which he moved the trial court for declarations that the decision to retire him at the age of 60 years was unlawful and unconstitutional, and that his retirement age was sixty-five (65) years unless he was otherwise lawfully terminated.
3. The respondent opposed the petition vide a replying affidavit sworn by one Martin Makallah, its Chief Human Resource Officer. He argued that the petition was bad in law as the respondent had not committed any constitutional violations against the applicant; that the petition did not raise any constitutional matter, but comprised of mere allegations; that the decision by the respondent to retire the applicant at 60 years was informed by the law, policy and Public Service Commission Regulation 70(2); that the applicant never registered with the respondent as a person with disability three years before the date of retirement as required; and that he only raised the issue of his disability after he was issued with a retirement notice.
4. In its judgment, the ELC dismissed the petition on ground that the applicant did not comply with the procedural requirements necessary for an employee in the civil service to notify the employer of his or her disability under the Public Service Act and corresponding regulations, three (3) years prior to retirement; that the simple lapse to cause placement with the employer in the database pursuant to Public Service Commission Regulations rendered the petition without foundation; and that the applicant could not claim discrimination having failed the bare minimum. It found the petition to be without merit and dismissed it but ordered each party to bear its own costs.
5. Aggrieved, the appellant filed a notice of appeal followed by this application which is supported by the grounds on the face of it and his affidavit sworn on December 17, 2021. He deposes that he is a person living with disability, whose rights have been violated and threatened by the respondent's conduct and actions forming the subject matter of the petition, the instant motion and the intended appeal. It is his contention that the intended appeal is arguable in that the ELC disregarded the subject employment regulations and contract, the evidence on record, and the submission by his counsel; and that, instead, the court relied on the Public Service Act and its corresponding Regulations that apply to the civil service oblivious of the fact that they do not apply to the respondent, as it is a private limited company (PLC). He contends that in failing to do so, the ELC failed to discern the constitutional and legal infringements by the respondent against him as urged.
6. On the whether the intended appeal will be rendered nugatory if the orders sought are not granted, the applicant deposes that the respondent shall proceed to forthwith retire him; that once the retirement is actioned, and in the event that the appeal is successful, due to lapse of time before the disposition of the appeal, the appeal will be rendered a mere mirage and academic exercise; that furthermore, the respondent will not be able to compensate him for months/years that will have been lost; that public interest tilts towards grant of a conservatory order as there is no greater public interest than ensuring that the dictates and sanctity of the Constitution are adhered to; that public interest also demands that judicial system affords real, tangible reliefs and not mere pyrrhic and academic wins, the basis on



which the appeal should be heard on its merits. Finally, the applicant argues that no prejudice would be suffered by the respondent if the application is allowed as the appeal can be fast-tracked so that it is heard without delay; and that, in contrast, it is him who would suffer prejudice if the application is not allowed as retirement matters are time-bound.

7. The application is opposed by way of a replying affidavit sworn on March 6, 2023 by the aforesaid Martin Makallah, the Chief Human Resource Officer of the respondent. He deposes that the application does not demonstrate any arguable points as the applicant's petition was dismissed on two grounds, being that it ought to have been filed as a statement of claim and not a petition, and that the applicant failed to prove discrimination and constitutional violations on the part of the respondent. Further, the applicant has failed to prove that the appeal would be rendered nugatory as he can be adequately compensated by way of damages; that he has not demonstrated that he is a person of means, and that if he is allowed to continue in employment, the respondent will face difficulties in recovering any money earned beyond the legal retirement age; and that it is in the interest of fairness and justice that the respondent be allowed to enjoy the fruits of its judgment. The respondent also contends that for a conservatory order to issue, the applicant must demonstrate some element of public interest which he has failed to do. In any case, he still has a right by way of an ordinary claim, to seek appropriate remedies arising from his retirement should this Court find that the retirement notice was wrongfully issued.
8. The applicant filed a further affidavit sworn on March 8, 2023, in which he averred that the learned Judge dismissed the petition for a single reason, being that he had failed to comply with the provisions of the [Public Service Commission Act](#) and the [Public Service Regulations, 2020](#). He contends that these provisions only apply to civil service and public bodies, and not to private companies such as the respondent, nor to his employment relationship with it. His view is that should this court find that, indeed, these provisions are inapplicable, then the impugned Judgment would have no other basis to stand, consequent to which the appeal is arguable and not frivolous; that damages for unlawful termination of employment are capped at twelve months' salary and, therefore, the same cannot be reasonable compensation when what he stands to lose is five years of paid employment; and, therefore without conservatory orders in place, the appeal would be rendered nugatory in substance.
9. The applicant further contends that it cannot be said, with any accommodation of humour, that what he earns in salary or wages for the duties he discharges is not commensurate to the value he adds to the respondent, as his tasks are critical for the respondent's productivity and profitability. He argues that it is in public interest that its (the respondent) marginalized members, including persons living with disability, receive reasonable accommodation to live a semblance of decent lives in accordance with international, constitutional, and statutory law. Therefore, conservatory orders will safeguard the public interest so that the appeal can be heard and determined without erosion of his right to work until he attains the age of 65.
10. The application came up for hearing before us on June 13, 2023. Learned counsel Mr. Akatch appeared for the applicant while learned counsel Mr. Okiri Papa holding brief for Mr. Bwire appeared for the respondent. Parties relied on their already filed submissions and were granted an opportunity to orally highlight them. The applicant's submissions are dated March 9, 2023 while those of the respondent are dated March 10, 2023.
11. The submissions are a replica of the averments fronted in support of, and in opposition to, the application. We do not therefore think it is necessary to rehash them. We however appreciate Mr. Akatch's reliance on the House of Lords decision by Lord Wright in *Evans v Butler* 2 ALL ER 246 for the proposition that in matters where the Court is called upon to apply its discretion, no one matter is an authority for another; that the application of a court's discretion is not premised on a set



standard which is binding, rather, each court can exercise its discretion in the manner it deems fit. On this ground, he urged us to find for the applicant and allow the application.

12. We have appraised ourselves with the application, the replying affidavit and the submissions of both parties. It is clear that the applicant in this application seeks a conservatory order ‘stopping any further/precipitate implementation of the respondent’s notice of retirement dated February 9, 2021 addressed to the applicant and the respondent’s decision in its letter dated October 4, 2021 addressed to the applicant, and/or any new communication or action/omission purporting to retire or retiring the applicant before attaining the retirement age of sixty-five (65)’, pending the hearing and determination of the applicant’s appeal. It is now settled law that the principles applicable in an application where a party seeks conservatory orders are one and the same as those applicable in an application under rule 5 (2) (b) of this *Court’s Rules, 2022*. They are that, 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.
13. The Court’s jurisdiction under rule 5 (2) was delineated in the case of *Trust Bank Limited & another v Investech Bank Limited & 3 others* [2000] eKLR as follows;

“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 it 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...”
14. On the arguability criterion, the applicant’s main contention was that the ELC erred in finding that the *Public Service Act* and the Regulations thereunder applied to the respondent yet it was not a public body.
15. Having carefully considered the application, we are not persuaded that the applicant has demonstrated that his intended appeal is arguable. It is in the public domain that the Government holds 70 per cent of the respondent’s shares, thus making it a public corporation and a public body within the meaning of the *State Corporations Act*, the *Public Service Commission Act*, and the *Public Service Commission Regulations*.
16. The first limb of the twin principle having failed, it serves no purpose for us to delve into considering the second limb, which is whether the appeal would be rendered nugatory if the orders sought are not granted. It is trite that the two limbs must operate conjunctively and not disjunctively. All the same, even if we were to consider it, it would equally fail for the reason that the respondent can compensate the applicant for the amount he would have earned until he attains the age of 65, and no evidence has been placed before us to show that it is incapable of doing so. Therefore, the applicant’s averment holds no water.
17. We also find nothing of public interest to warrant us to consider the application in favour of the applicant.
18. In light of our findings above, we find no merit in the application and we dismiss it with each party to bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2023.

K. M’INOTI

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

