



REPUBLIC OF KENYA



KENYA LAW
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**Teachers' Service Commission v M'Ithinji (Civil Application
E101 of 2022) [2023] KECA 1578 (KLR) (8 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1578 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E101 OF 2022
W KARANJA, J MOHAMMED & LK KIMARU, JJA
NOVEMBER 8, 2023**

BETWEEN

TEACHERS' SERVICE COMMISSION APPLICANT

AND

DAVID KIMATHI M'ITHINJI RESPONDENT

(An application for stay of execution pending the hearing and determination of an appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Nyeri (Marete, J.) dated and delivered on 31st October, 2022) in ELRC Cause No. E042 of 2021)

RULING

1. The applicant filed a notice of motion essentially under Rule 5 (2) (b) of the Court of Appeal Rules seeking the following orders from the Court:

“That the Honourable Court be pleased to order stay of execution of the judgment of Hon. D. K. Njagi Marete delivered on 31st October, 2022 in Nyeri (ELRC) Cause No. E042 of 2011 and all the consequential orders pending the hearing and determination of the intended appeal”.

2. The application is supported by the annexed affidavit of Jane Irambu, the Deputy Director in charge of Field Services of the applicant and the grounds stated on the face of the application. The applicant states that it was aggrieved by the said decision of the Employment and Labour Relations Court [ELRC] and had filed an appeal against the same to this Court. The applicant states that the intended appeal raises substantial and weighty issues which will likely succeed on appeal. The applicant prays that the execution of the said judgment be stayed pending the hearing of the appeal because, if the same is not stayed, it will cause irreparable loss and damage to the applicant.



3. It is applicant's contention that the order by the ELRC to reinstate the respondent to service will erode and compromise the nobility, integrity and sanctity of the teaching profession noting that the subject matter of the disciplinary proceedings that led to the respondent's termination from employment was breach of trust when he, contrary to the code of conduct and ethics, failed to protect a minor, who he was in a position of loco parentis. The applicant was apprehensive that the respondent would likely not be in a position to refund the sum of Kshs. 661,200 ordered to be paid to him by the ELRC should the appeal succeed. The applicant therefore urged the Court to favourably consider the application and allow the same.
4. The application is opposed. The respondent's advocate swore a replying affidavit in opposition to the application. He deponed that the applicant had failed to establish any basis why the judgment of the ELRC should be stayed. He pointed out that even if the decretal sum was paid, it could not render the appeal nugatory. The respondent reiterated that if the order of stay craved for by the applicant is granted, it would prejudice the respondent as he has been financially embarrassed since he was unlawfully dismissed from employment on 28th March, 2019. Balancing the interest of justice, in the opinion of the respondent, means that the applicant will not suffer any prejudice if the application for stay is declined.
5. The applicant's and respondent's counsel filed their respective written submissions. This Court has considered the said submissions including the cited authorities. The jurisdiction of this Court under Rule 5(2) (b) of the Court of Appeal Rules is circumscribed. It is original and discretionary. For the applicant to succeed in their application, they must establish that their intended appeal is arguable, and secondly, that if stay of execution is not granted, the appeal would be rendered nugatory.
6. In *Trust Bank Ltd. & Anor v Investech Bank Ltd. & 3 Others* [2000] eKLR, the Court held thus:

“The jurisdiction of the court under rule 5

 - (2) aforesated, is original and discretionary, and it is trite law that to succeed, an
 - (b) applicant has to show, firstly that his appeal or intended appeal is arguable, or put another way, it is not frivolous; and secondly, that unless he is granted a stay the appeal, if successful, will be rendered nugatory. Those are guiding principles but these principles must be considered against the facts and circumstances of each case...”
7. The applicant is aggrieved by the decision of the ELRC to reinstate the respondent back to employment after he was dismissed following a disciplinary process initiated against the applicant after a complaint was made that the respondent had administered corporal punishment on one of his students at his office contrary to the Code of Conduct and Ethics that bound him as a teacher. The applicant has annexed a copy of the draft memorandum of appeal to the affidavit in support of the application in which it challenges the findings made by the ELRC. On his part, the respondent contends that the learned ELRC Judge correctly found that he had been unlawfully terminated from employment. The respondent was not persuaded that the intended appeal to be lodged by the applicant before this Court is meritorious.
8. We have perused the judgment of the ELRC and the draft memorandum of appeal annexed to the supporting affidavit to the application. We are convinced that the draft grounds of appeal put forward by the applicant are arguable. The applicant is aggrieved that the learned Judge of the ELRC usurped its constitutional mandate in exercising control over the discipline of teachers. We agree with the applicant that, at least, on this one ground, the intended appeal cannot be said to be frivolous. We therefore hold that the applicant has established to the satisfaction of this Court that the intended appeal is arguable.



9. As regards the second limb that the applicant has to establish, whether the intended appeal will be rendered nugatory if the judgment of the ELRC is not stayed, the applicant argued that its mandate to discipline teachers and protect the children under whose care the teachers have been entrusted, would be undermined if the order of stay of execution is not granted. The applicant further urged us to find that it was unlikely that the respondent will refund the liquidated sum awarded by the ELRC in the impugned judgment if the applicant was to succeed in its appeal. On his part, the respondent urged the Court to balance the interest of justice and hold that he would be prejudiced if stay of execution is granted as he would suffer financial embarrassment.
10. We have considered the rival submissions made by the parties in that regard. It was clear to us that the applicant indeed established that its intended appeal would be rendered nugatory if the respondent is allowed to execute the judgment of the ELRC. The respondent did not challenge the assertion made by the applicant to the effect that if he were to be paid the liquidated amount ordered by the ELRC he would not be in a position to refund the same if the appeal lodged by the applicant succeeds. Further, the decision of the ELRC to reinstate the respondent back to employment three (3) years after his termination appears prima facie, (and without appearing to make a determination on it) contrary to Section 12 (3) (VII) of the *Employment and Labour Relations Court Act*. We therefore hold that the applicant established to the satisfaction of this Court that indeed the intended appeal will be rendered nugatory if the judgment of the ELRC is not stayed pending the hearing and determination of the appeal.
11. In the premises therefore, the judgment delivered by the ELRC on 31st October, 2023 together with all consequential orders is hereby stayed pending the hearing and determination of the appeal. The costs of the application shall await the outcome of the appeal.

It is so ordered.

DATED AND DELIVERED AT NYERI THIS 8TH DAY OF NOVEMBER, 2023.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

