



**Abdile v Okiiti & another (Civil Appeal (Application)  
E191 of 2021) [2022] KECA 103 (KLR) (21 January 2022) (Ruling)**

Neutral citation: [2022] KECA 103 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E191 OF 2021  
DK MUSINGA, AK MURGOR & KI LAIBUTA, JJA  
JANUARY 21, 2022**

**BETWEEN**

**MOHAMMED ABDILE ..... APPLICANT**

**AND**

**OKIYA OMTATA OKOITI ..... 1<sup>ST</sup> RESPONDENT**

**MASAI MARA UNIVERSITY ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of execution of the judgment and decree of the  
Employment and Labour Relations Court at Nairobi (M. Onyango, J.)  
dated 28th May, 2021 in ELRC Miscellaneous Application No. 52 of 2020)*

**RULING**

1. By a Notice of Motion dated 8<sup>TH</sup> June 2021 premised on rule 5 (2) (b) of the [Court of Appeal Rules](#), the applicant, Prof. Mohamed Abdile, seeks orders for stay of execution of the judgment and orders of the Employment and Labour Relations Court delivered on 8<sup>th</sup> April, 2021 pending the determination of this application and his intended appeal.
2. In its judgment, the court issued an order of certiorari to quash i) the decision of the 2<sup>nd</sup> respondent to form an Ad Hoc Appeals Committee of the Council to hear and determine the applicant's appeal against summary dismissal; ii) the decision made by the Ad Hoc Appeals Committee to hear and determine the applicant's appeal against summary dismissal; and iii) the decision made by the 2<sup>nd</sup> respondent to reinstate the applicant.
3. The motion was brought on grounds that the applicant has an arguable appeal for the reason that the prerogative orders issued by the trial court, which sought to uphold and enforce the applicant's summary dismissal from the position of Deputy Vice Chancellor (Administration, Finance and Planning) following the 2<sup>nd</sup> respondent's Council decision of 4<sup>th</sup> March 2020, was ultra vires.



4. The motion was supported by the applicant's sworn affidavit of even date and written submissions wherein it was asserted that the appeal would be rendered nugatory in the event the appeal were to succeed if the orders sought in this application were not granted.
5. By a replying affidavit sworn on 21<sup>st</sup> June 2021 by the 1<sup>st</sup> respondent and in written submissions, it was contended that the appeal was not arguable because the merits of the 2<sup>nd</sup> respondent's Council decision that resulted in his summary dismissal were not contested or determined by the trial court. Further, that the trial court was right in finding that the applicant could not rely on the provisions of an unsigned Collective Bargaining Agreement to appeal to the Ad Hoc Appeals Committee against the summary dismissal decision, since he was not a unionisable member of staff, and so was not eligible to adopt the terms of the Collective Bargaining Agreement.
6. When the application came up before us, there was no appearance for the applicant despite their having been served. The applicant nevertheless had filed written submissions. Mr. Okiya Omtata, the 1<sup>st</sup> respondent, appeared in person, and informed us that he would be relying on his written submissions in their entirety, while Mr. Muriithi, learned counsel for the 2<sup>nd</sup> respondent, stated that the 2<sup>nd</sup> respondent would not be participating in the application since his client had no position to take, one way or the other.
7. In so far as applications filed under rule 5 (2) (b) of this Court's Rules are concerned, the threshold requirements to be satisfied as exemplified in the case of *Republic vs Kenya Anti-Corruption Commission & 2 others* [2009] eKLR, are that:

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that, first, the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”
8. On whether the intended appeal is arguable, it is observed that central to the intended appeal is the applicant's grievance that the trial court failed to appreciate that the applicant was not afforded a fair hearing prior to the decision of 5<sup>th</sup> March 2020, summarily dismissing him; And, further, that the court acted ultra vires by considering the merits of the 2<sup>nd</sup> respondent Council's decision that dismissed the applicant instead of ascertaining whether the proper procedures and processes were followed; that the trial court had no powers to determine the merits of the decision to dismiss or uphold the Council's decision.
9. In effect, the applicant raises a variety of issues that include; whether in determining the judicial review application, the court ought to have considered the merits of the Council's decision or whether it ought to have limited itself to the decision making process that led to the summary dismissal; or whether the 2<sup>nd</sup> respondent's Council was entitled to adopt the Ad Hoc Appeals process set out under the 2<sup>nd</sup> respondent's Collective Bargaining Agreement to reinstate the applicant. In view of the peculiar nature of the dispute, we consider the intended appeal to be arguable.
10. On the nugatory aspect, the applicant complains that the learned judge's decision prohibited the Council from implementing or effecting the decision reinstating the applicant, and, instead, had compelled the 2<sup>nd</sup> respondent's Council to enforce the decision to summarily dismiss the applicant; that unless the stay of execution orders sought are granted, the applicant would suffer grave loss and damage. We have considered the pleadings and, in our view, there is nothing to stay. This is because the applicant admits that after he was summarily dismissed he was “...completely locked out of his



place of work ...” and for several months, had not received his dues from the 2<sup>nd</sup> respondent. Given the prevailing circumstances, there is nothing that demonstrates that the appeal will be rendered nugatory.

11. Consequently, the applicant having failed to satisfy the twin conditions precedent for granting of an order under rule 5(2) (b) of this Court’s Rules, the application dated 8<sup>th</sup> June 2021 lacks merit and is hereby dismissed.

Costs in the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JANUARY, 2022.**

**D.K. MUSINGA (P)**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K.I. LAIBUTA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

