



**Teachers Service Commission v Kiraithe (Civil Application
E267 of 2021) [2022] KECA 517 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 517 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E267 OF 2021
DK MUSINGA, W KARANJA & AK MURGOR, JJA
APRIL 28, 2022**

BETWEEN

TEACHERS SERVICE COMMISSION APPLICANT

AND

MUCHIRI KIRAITHE RESPONDENT

*(An application for stay of execution of the Judgment of the Employment
& Labour Relations Court of Kenya at Nairobi (Wasilwa, J.)
delivered on 27th October 2020 in ELRC Cause No.1966 of 2015)*

RULING

1. The applicant's Notice of Motion dated 28th July 2021 seeks stay of execution of the judgment delivered on 20th October 2020 by Wasilwa, J. in ELRC Cause No.1966 of 2015 in the Employment & Labour Relations Court at Nairobi in which the learned judge awarded the respondent a sum of Kshs.1,465,400.00 being salary for the period he was on suspension and damages for wrongful disciplinary process.
2. The applicant and the respondent enjoyed an employer-employee relationship. The respondent was a teacher posted at Bathi Secondary School up to 16th July 2012 when he was interdicted by the respondent through the Secretary to the Board of Governors of the said School. The trial court in its judgment held that the respondent's interdiction was unlawful because the Board Secretary did not have authority to issue the interdiction letter.
3. Although there was no appearance by both parties at the hearing of this application, both parties had filed their respective written submissions. The applicant submitted that it has an arguable appeal. It faulted the trial court for disregarding the express provisions of section 62 of the *Basic Education Act* and Regulation 5 of the Code of Regulation, (2005) and thereby making erroneous finding that the Board Secretary had no authority to execute the letter of interdiction. The applicant cited



Civil Application No. 56 of 2013, Kenya Medical Lab Technicians & Technologists Board vs Prime Communications Ltd for the proposition that a single bona fide issue is sufficient for an appeal to be termed as arguable.

4. On the nugatory aspect, the applicant submitted that the respondent was likely to execute the decree of the trial court at any time. If this were to happen, the applicant, which is a recognized Independent Commission under the Constitution of Kenya, 2010, would have to pay public money to the respondent. The applicant is apprehensive of the ability of the respondent to repay this money should the intended appeal be successful because the respondent is now retired and is a man of straw. See *National Credit Bank Ltd vs Aquinas Francis Wasike & Another* [2006] eKLR. For these reasons, the applicant is of the view that should the orders sought not be granted, the intended appeal, if successful, may amount to just an academic exercise.
5. The respondent filed a replying affidavit dated 7th August 2021 as well as written submissions. We have perused the replying affidavit and the written submissions which were both filed in person by the respondent. We note that instead of responding to the issues raised in the application, the respondent has merely regurgitated his pleadings and evidence before the trial court. The response has nothing useful on the two limbs that must be satisfied in a rule 5 (2)
 - b. application, save to note that in his written submissions the respondent argues that the trial court did not make any mistake in law and that the intended appeal is scandalous, frivolous and vexatious.
6. We have considered the application. It is now well established that in an application of this nature an applicant must satisfy this Court that the appeal or intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR. Even one arguable ground of appeal will suffice.
7. The applicant has submitted that the learned judge disregarded the express provisions of section 62 of the *Basic Education Act* and Regulation 5 of the Code of Regulation, (2005), thereby making erroneous finding that the School Principal, who was also the Board Secretary, had no authority to execute the letter of interdiction. This to us does not appear as an idle argument. We are satisfied that this is an arguable ground of appeal. We need not say much at this juncture lest we embarrass the bench that shall eventually hear the appeal.
8. On the nugatory aspect, we agree with the applicants that unless the orders sought are granted, the appeal, if successful, will be rendered nugatory because the applicant will have to pay the respondent from public coffers, whereas the ability of the respondent to repay the entire decretal sum plus costs and interest should the intended appeal be successful is doubtful. It is important to point out that the respondent in his replying affidavit and written submissions steered clear of the allegation that he is a man of straw who is not able to repay the decretal sum.
9. For these reasons, we grant the orders sought by the applicant. The costs of the application shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

W. KARANJA



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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

