



**Principal Secretary- Ministry of Interior & Co-ordination of National  
Government & another v Macharia & another (Civil Application  
E356 of 2021) [2022] KECA 556 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KECA 556 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E356 OF 2021  
AK MURGOR, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA  
MAY 27, 2022**

**BETWEEN**

**PRINCIPAL SECRETARY- MINISTRY OF INTERIOR & CO-ORDINATION OF  
NATIONAL GOVERNMENT ..... APPLICANT**

**AND**

**PUBLIC SERVICE COMMISSION ..... APPELLANT**

**AND**

**ISAAC NGARUIYA MACHARIA ..... 1<sup>ST</sup> RESPONDENT**

**JAMES KIARIE KINUTHIA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application brought under Articles 159 and 164 of the Constitution, section 3, 3A and 3B of the Appellate Jurisdiction Act, Rule 5(2) (b) of the Court of Appeal Rules 2010 seeking stay of execution of the judgment and decree of Employment & Labour Relations Court at Nairobi ( M. Mbaru, J.) dated 28th June, 2021 in ELRC Cause No. 1718 of 2017)*

**RULING**

1. By a Notice of motion dated 21<sup>st</sup> September, 2021, the applicants (Principal Secretary- Ministry of Interior & Co-ordination of National Government and the Public Service Commission) seek an order of stay of execution of the judgment and decree of the Employment and Labour Relations Court dated 26<sup>th</sup> June, 2021 pending the hearing and determination of the appeal, and a grant of a stay of further execution of proceedings arising from the impugned judgment.
2. The application is brought on the grounds that the Employment and Labour Relations Court allowed the respondent's claim having found that the respondents' employment was unfairly terminated. The court went on to award each respondent compensation of Kshs. 480,000, payment of notice of Kshs.



80,000, unpaid salary from 12<sup>th</sup> July, 2017 to 26<sup>th</sup> April, 2018; pension dues in accordance with the applicable regulations; interest and costs.

3. The applicants were aggrieved with the decision and are apprehensive that the respondent shall execute the judgment. They contend that they may be found in contempt of the Court orders and that, unless the orders sought are granted, their interest and those of the greater public shall be severely prejudiced; that the respondents have on numerous occasions visited the Immigration Department and written various letters demanding payment in terms of the judgment. It is asserted that the respondents have not demonstrated that they will be capable of refunding the decretal amounts if they are paid.
4. It was further contended that the appeal is arguable with a high chance of success for various reasons, including that, the learned judge failed to appreciate that the procedure for disciplining civil servants is prescribed in the *Public Service Commission Act*, the Public Service Commission Regulations, 2005 and the Human Resources Policy and Procedure Manual for the Public Service, all of which were applicable to the respondents' case and, furthermore, the judge failed to take into account the stipulations of Section 41 of the *Employment Act* and disregarded judicial authorities that allow an employer the discretion to determine whether disciplinary proceedings should be conducted orally or in writing and that, in general, the learned judge failed to properly evaluate the evidence.
5. The applicants finally contended that they are liable to be held in contempt of the judgment unless the order of stay of execution is granted; that they risk being jailed or fined which would be an infringement on their rights to liberty or placed in financial hardship. The application was supported by the affidavit of Alexander Muteshi, the 1<sup>st</sup> applicant's Director of General Immigration Services, as well as on written submissions.
6. In a replying affidavit sworn by Isaac Ngaruiya Macharia, the 1<sup>st</sup> respondent on behalf of the respondents, it was deponed that this Court lacks jurisdiction to entertain the applicants Motion in view of the Notice of appeal having lapsed by effluxion of time; that the applicants have complied with the judgment, since the applicants indicated in a letter dated 16<sup>th</sup> July, 2021 that the process was ongoing and a decision would be communicated in due course; that they waited for more than 60 days but no communication was forthcoming; that they subsequently learnt that the Legal Unit of the Attorney General had appealed and obtained stay of execution orders. The respondents deponed that this was not correct as there are no further proceedings pending before the trial court save for execution, and this Court cannot stay taxation proceedings or the issuance of a certificate; that this application is premature as no decree has been drawn or bill of costs taxed; that the appeal is not arguable and it has no merits; and that the order of stay of execution will be prejudicial to the respondents as it will only seek to further perpetuate injustice and suffering on the respondents, particularly since they have been unable to secure alternative employment due to adverse background checks communicated by their former employer.
7. In their written submissions, the respondents contended that the appeal is not arguable.
8. In so far as applications filed under rule 5(2) (b) of this *Court rules* are concerned, the threshold requirement to be satisfied are amplified in the case of *Republic vs Kenya Anticorruption Commission and 2 others* [2009] eKLR thus;

“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 their results or success could be rendered nugatory”.



9. Consequently, is the appeal arguable? The applicants' complaint is that in determining that the respondents' employment was unfairly terminated, the learned judge failed to take into account the procedure for disciplining civil servants that is prescribed in the Public Service Commission Act, the Public Service Commission Regulations, 2005 and the Human Resources Policy and Procedure Manual for the Public Service, all of which were applicable to the respondents' case and that, in general, the court failed to properly evaluate the evidence. As to whether or not the learned judge failed to take into account relevant legal provisions in the above laws and regulations that were applicable to disciplining and removal of the respondents as public servants from employment, are indeed matters that we consider to be arguable.
10. On the nugatory aspect, the applicants have indicated that if the decretal sums are paid to the respondents, there is nothing that demonstrates that they will be in a position to refund the amounts paid to them in the event that the appeal were to succeed. We have gone through the replying affidavit and cannot find any assurance from the respondents that they are capable of refunding the amounts paid. Our view is that it would be more prudent to have the dispute settled on appeal once and for all and with finality prior to payment of the decretal sums to the respondents.
11. Accordingly, the applicants having satisfied the twin requirements specified under rule 5(2)(b) of this Courts' rules, the motion dated 21<sup>st</sup> September, 2021 is merited and is hereby allowed. Costs in the appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF MAY, 2022.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**A. MBOGHOLI MSAGHA**

.....

**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*

**DEPUTY REGISTRAR**

