



**Kenya Medical Research Institute v Muthoni & 34 others & another (Civil Application E374 of 2021) [2022] KECA 873 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 873 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E374 OF 2021  
K M'INOTI, F SICHALE & S OLE KANTAI, JJA  
JULY 22, 2022**

**BETWEEN**

**KENYA MEDICAL RESEARCH INSTITUTE ..... APPLICANT**

**AND**

**AGNES MUTHONI & 34 OTHERS ..... 1<sup>ST</sup> RESPONDENT**

**UNION OF NATIONAL RESEARCH & ALLIED INSTITUTES STAFF OF  
KENYA ..... 2<sup>ND</sup> RESPONDENT**

*(Application for stay of execution pending the hearing and determination of an appeal from the Ruling and Order of the Employment and Labour Relations Court at Nairobi (Mbaru, J.) dated 14th October 2021 in ELRCC No. 37(N of 2010))*

**RULING**

1. The applicant, Kenya Medical Research Institute is aggrieved by the ruling and orders of the Employment and Labour Relations Court at Nairobi dated 14<sup>th</sup> October 2021. It intends to appeal against that ruling and towards that end filed a notice of appeal on the same date that the ruling was delivered. By the ruling that the applicant intends to appeal, the trial court ordered the applicant to re-engage its 35 former employees (collectively refer to as “the 1<sup>st</sup> respondent”) and directed the 1<sup>st</sup> respondent to report to duty on 18<sup>th</sup> October 2021 at 8.30 am (within four days of the ruling) for deployment. The court further ordered the applicant to tabulate and pay to the 1<sup>st</sup> respondent within 30 days their basic salary from 17<sup>th</sup> June 2016 until the date of the ruling. Additionally, the court directed that a sum of Kshs. 200,000.00, said to have been deposited earlier in a bank pursuant to a court order, be released to the 1<sup>st</sup> respondent’s advocates forthwith. It is worth noting that the employment of the 1<sup>st</sup> respondent was terminated on 17<sup>th</sup> December 2009, and although they had obtained an order for reinstatement or re-engagement, that order was stayed by the court, meaning that the 1<sup>st</sup> respondent had been out of office for a period of approximately 11 years.



2. In its application for stay of execution filed under certificate of urgency on 21<sup>st</sup> October 2021 and supported by the affidavit of Prof. Samuel Kariuki, its acting Director General, as well as in its written submissions, the applicant contends that its intended appeal is arguable and will be rendered nugatory unless an order of stay of execution is granted. Among the grounds that the applicant intends to pursue in the appeal is that the trial court erred by failing to consider the applicant's replying affidavit which was on record and instead stated that the applicant had not filed a response, by ordering reinstatement of the 1<sup>st</sup> respondent yet section 12 (vii) of the *Employment and Labour Relations Court Act* limits the remedy of reinstatement to three years of dismissal, by failing to consider the impracticability of reinstating the 1<sup>st</sup> respondent after 11 years of termination, by awarding the 1<sup>st</sup> respondent back pay even after holding that they were not entitled to the same, and by ordering payment of Kshs. 200,000 from a non-existent bank account. Regarding whether the appeal risked being rendered nugatory, the applicant contended that it stood to suffer immense loss and damage since upon implementation, the order for reinstatement or re-engagement was irreversible, and that it will not be able to recover from the 1<sup>st</sup> respondent the substantial amount of back pay that the court ordered. In support of its submissions the applicant relied on the rulings in *Manchar Singh Sagoo & Another v Caroline Njeri Mwicigi & 3 Others* [2018] eKLR, *Printing Industries Ltd & Another v Bank of Baroda (K) Ltd* [2014] eKLR and *Ahmed Musa Ismael v. Kumba ole Ntamorua & 4 Others* [2014] eKLR.
4. The 1<sup>st</sup> respondent opposed the appeal vide a replying and a supplementary affidavit sworn by Garland Biko Livondo, a member of the 1<sup>st</sup> respondent, as well as its written submission dated 8<sup>th</sup> November, 2021. The 1<sup>st</sup> respondent contended that the order for reinstatement of the former employees and payment of their back pay was made on 13<sup>th</sup> May 2010 by the former Industrial Court and that all that the trial court did in its ruling of 14<sup>th</sup> October 2021 was to enforce the award of the Industrial Court. It was therefore the 1<sup>st</sup> respondent's contention that the applicant's assertion that the court had reinstated the 1<sup>st</sup> respondent after 11 years had no basis and that the intended appeal is not arguable.
5. The 1<sup>st</sup> respondent further submitted that the application for stay of execution had "largely" been overtaken by events because the applicant had "largely" complied with the order of the trial court and had redeployed the 1<sup>st</sup> respondent. It was also contended that the applicant had indicated that in a bid to comply with the order of the trial court, it had sought money from the parent ministry to pay the back salaries. Having reinstated the 1<sup>st</sup> respondent, it was submitted, there was nothing left to stay and the intended appeal therefore cannot be rendered nugatory if it succeeded. Lastly the 1<sup>st</sup> respondent contended that the current application is an abuse of the process of the Court because the applicant had filed an application for stay of execution in the trial court. The 1<sup>st</sup> respondent relied on the decisions in *Dynes Muriithi & 4 Others v. Law Society of Kenya & Another* [2016] eKLR and *Teachers Service Commission v. Kenya National Union of Teachers & 3 Others* [2015] eKLR on the nature of the Court's jurisdiction under rule 5(2)(b).
6. On its part the 2<sup>nd</sup> respondent opposed the application through written submissions, which, with respect, dwelt on the history of the litigation instead of addressing the issues that are pertinent and germane to an application for stay of execution. We do not intend to engage with those submissions further as they are not relevant to this application.
7. We have anxiously considered the application for stay of execution. It is common ground that to entitle the applicant to an order of stay of execution, it must demonstrate two things. The first is that it has an arguable appeal. An arguable appeal is not one which must necessarily succeed, but rather, one which is not frivolous and raises at least one issue that deserves consideration by the Court. To establish an arguable appeal, the applicant is not required to establish a multiplicity of issues. Even one bona fide issue will suffice. Secondly the applicant must satisfy the court that unless the order of stay of execution



is granted, the appeal will be rendered nugatory if it succeeds. The concern here is to ensure that what the appeal seeks to forestall does not irreversibly happen in the interim period pending the hearing and determination of the appeal, particularly should the appeal succeed. (See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR for elaboration of these principle).

8. A pending application for stay of execution in the trial court of and by itself cannot deprive this Court of jurisdiction to hear an application under rule 5(2)(b), so long as there is a notice of appeal on record. In the terms of the above rule, the discretion of the Court is unfettered, the main consideration being that the discretion is exercised judiciously (hence the test of the twin principles) and on such terms as the Court may think just. In *Githunguri v Jimba Credit Corporation Ltd (No. 2)* [1988] eKLR, this Court expressed itself as follows on its jurisdiction under rule 5(2)(b):-

“We think this Court’s jurisdiction under rule 5(2) to grant either a stay of execution, an injunction or stay of any further proceedings, arises if a notice of appeal has been lodged against the decision or ruling appealed from in accordance with rule 74. And we are then clothed with jurisdiction to grant any of such orders “on such terms as to the Court may think just”. That rule confers an independent original discretion on us and we have to apply our own minds de novo on the suitability or otherwise of the relief sought. It is not an appeal from the learned Judge’s discretion to ours.

9. Having carefully considered the application, we are satisfied that the issues that the applicant intends to raise are arguable. Whether the remedy of reinstatement is available after the lapse 11 years is clearly arguable. Whether the applicant was denied a fair hearing by failure to consider its submissions on record is also an arguable point. As we have pointed out, even one arguable issue will suffice to entitle the applicant to an order of stay of execution, so long as the second condition is also satisfied.
10. Turning to whether the appeal will be rendered nugatory, the assertion by the 1<sup>st</sup> respondent that the former employees have already been reinstated is not controverted by the applicant. In these circumstances, the balance of convenience dictates that we must not disturb the arrangement that is in place for the last nine months, with the 1<sup>st</sup> respondent back at work. We are also satisfied that decision is what is just in the circumstances of this application.
11. However, it is conceded by the 1<sup>st</sup> respondent that the order for back pay has not been implemented for one reason or another. The applicant contends that the amount involved is substantial and may not be recoverable from the 1<sup>st</sup> respondent should the appeal succeed. The respondents have not addressed or rebutted this assertion.
12. In the premises, we shall issue an order of stay of execution of the ruling and orders of the Employment and Labour Relations Court dated 14<sup>th</sup> October 2021, except as regards reinstatement of the 1<sup>st</sup> respondent, which has already been implemented and the prayer for stay of execution is effectively overtaken by events. For the avoidance of doubt, the stay of execution relates to tabulation and payment of back wages as well as payment of Kshs.200,000 and accrued interest to the 1<sup>st</sup> respondent’s advocates. Costs shall abide the outcome of the appeal. It is so ordered.

**DATED AT NAIROBI THIS 22ND OF DAY JULY, 2022**

**K. M’INOTI**

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**JUDGE OF APPEAL**

**F SICHALE**



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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

