



**Laikipia County Public Service Board v Public Service Commission
& another; Laikipia County Government (Interested Party) (Civil
Application E081 of 2021) [2022] KECA 908 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 908 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E081 OF 2021
HM OKWENGU, F SICHALE & A MBOGHOLI-MSAGHA, JJA
JULY 22, 2022**

BETWEEN

LAIKIPIA COUNTY PUBLIC SERVICE BOARD APPLICANT

AND

PUBLIC SERVICE COMMISSION 1ST RESPONDENT

**KENYA MEDICAL PHARMACISTS & DENTIST PRACTITIONERS'
UNION 2ND RESPONDENT**

AND

LAIKIPIA COUNTY GOVERNMENT INTERESTED PARTY

(Application for stay of execution and further proceedings pending the filing and bearing of an intended appeal from the Judgment of the Employment and Labour Relations Court (Marete J) dated 19th July 2021) In NYERI ELRC PETITION NO. 26 OF 2020)

RULING

1. By a notice of motion dated 9th September 2021, the applicant seeks an order of stay of execution of the decision of the 1st Respondent made on 12th August 2020 and adopted by the Employment and Labour Relations Court in Nyeri in Judicial Review No. 9 of 2019, together with the judgment and all consequential orders of the Employment and Labour Relations Court in Petition No. 26 of 2020 delivered on 19th July 2021 pending the hearing and determination of the intended appeal.
2. The application is based on the grounds set out on the face of the motion and the supporting affidavit of Timothy Wamiti dated 10th September 2021. The respondents did not file any replying affidavit to the application but the 2nd respondent filed written submissions. There are no written submissions that were filed by the applicant.



3. It is necessary to set out the brief facts leading to this application. The members of the 2nd respondent participated in a strike after giving due notice of the intended industrial action after which they were dismissed by the applicant. The applicant then advertised the positions with a view to employing other persons in place of the members of the 2nd respondent. The 2nd respondent lodged an appeal against the applicant before the 1st respondent which sought the reinstatement of its members.
4. On 12th August, 2020 the 1st Respondent set aside the decision to summarily dismiss the members of the 2nd respondent who were doctors, following which they were reinstated to the positions they had held earlier within the applicant without losing their remunerations and benefits.
5. Those orders were adopted by the Employment and Labour Relations Court on 19th October 2020 in Judicial Review No. 9 of 2019. The applicant was aggrieved by that adoption but did not file any appeal. Instead, the applicant filed Petition No. 26 of 2020 alleging that its constitutional rights had been breached. That Petition was dismissed in a judgment delivered on 19th July, 2021.
6. It is submitted on behalf of the applicant that as a result of the said judgment, the 2nd respondent had filed a contempt of court application dated 17th August 2021 seeking to enforce the decision and orders granted on 12th August, 2020. That this will force the applicant to re-employ the members of the 2nd respondent whom it had laid off and which action will cause immense fiscal strain on its part. That the applicant's appeal raises weighty matters of law and is arguable with high probability of success.
7. On the nugatory aspect, the applicant avers that, unless the application is allowed and the judgment stayed, the issues of merit and substance raised in the memorandum of appeal will automatically be overtaken by events, since the applicant will be compelled to implement the decision of the 1st Respondent and the appeal will be reduced to a mere academic exercise.
8. The 2nd respondent submitted that the application is fatally flawed and cannot justify any order of stay under Rule 5 (2) (b) of the Court Rules for the reason that, the orders by the Employment and Labour Relations Court (ELRC) that dismissed the Petition were in the negative. The 2nd respondent relied on the case of *George Ole Sangui & 12 others v Kedong Ranch Limited* [2015] eKLR in support of that submission.
9. The principles for our consideration in the exercise of the Court's discretion under Rule 5(2) (b) of the Court Rules, to grant an order of stay of execution are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, that is not to say the appeal is one which will necessarily succeed, but one which is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay of execution is granted, the appeal or intended appeal would be rendered nugatory. These principles were restated and amplified by this Court in the decision of *Multimedia University & Another vs. Professor Gitile N. Naituli* (2014) eKLR wherein it was stated,

“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underling those decisions was summarized in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR as follows:



- i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge’s discretion to this Court.
 - v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
 - vi
 - vii In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
 - viii. An applicant must satisfy the Court on both the twin principles.
 - ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
 - x. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.
 - xi
 - xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - xii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
10. We have carefully considered the grounds set out in the motion. In our view the appeal is arguable on the grounds, inter alia, whether the Court erred in holding that the issues of merits should not be addressed at the appeal stage, whereas the subject matter of the petition was challenging the decision of the Public Service Commission on its merits and substance.
11. On the nugatory aspect, the ELRC dismissed the applicant’s Petition with costs to the 2nd respondent. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the ELRC is in the nature of a negative order incapable of execution save for the order on costs. As such, there is no positive order capable of enforcement that could be the subject matter of the application for stay of execution, other than the order of costs, which the applicant has not sought to have stayed.
12. This Court has had occasion severally to address this issue. In the case of *George Ole Sangui & 12 others v Kedong Ranch Limited* (supra) cited by the 2nd respondent, the Court observed as follows,
- “The High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything.



It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”

13. Further, in *William W. Wabome & The Registrar of Trade Unions vs. Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers*, [2006] eKLR this Court stated:

The order of 19.9.2005 did not grant the respondents any relief other than costs which can be enforced through execution. On the contrary, the order in fact denied the applicant a relief in the sense that it struck out the application for leave and of order of stay and set aside the leave and stay granted earlier. There is no judgment in favour of the respondents which is capable of enforcement by execution save for costs.”

14. In view of the foregoing, the applicant has failed to prove the second limb of Rule 5(2)(b) of the Court Rules. As the applicant is required to establish both limbs, and having failed to do so, the notice of motion dated 9th September, 2021 is hereby dismissed with costs to the 2nd respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

